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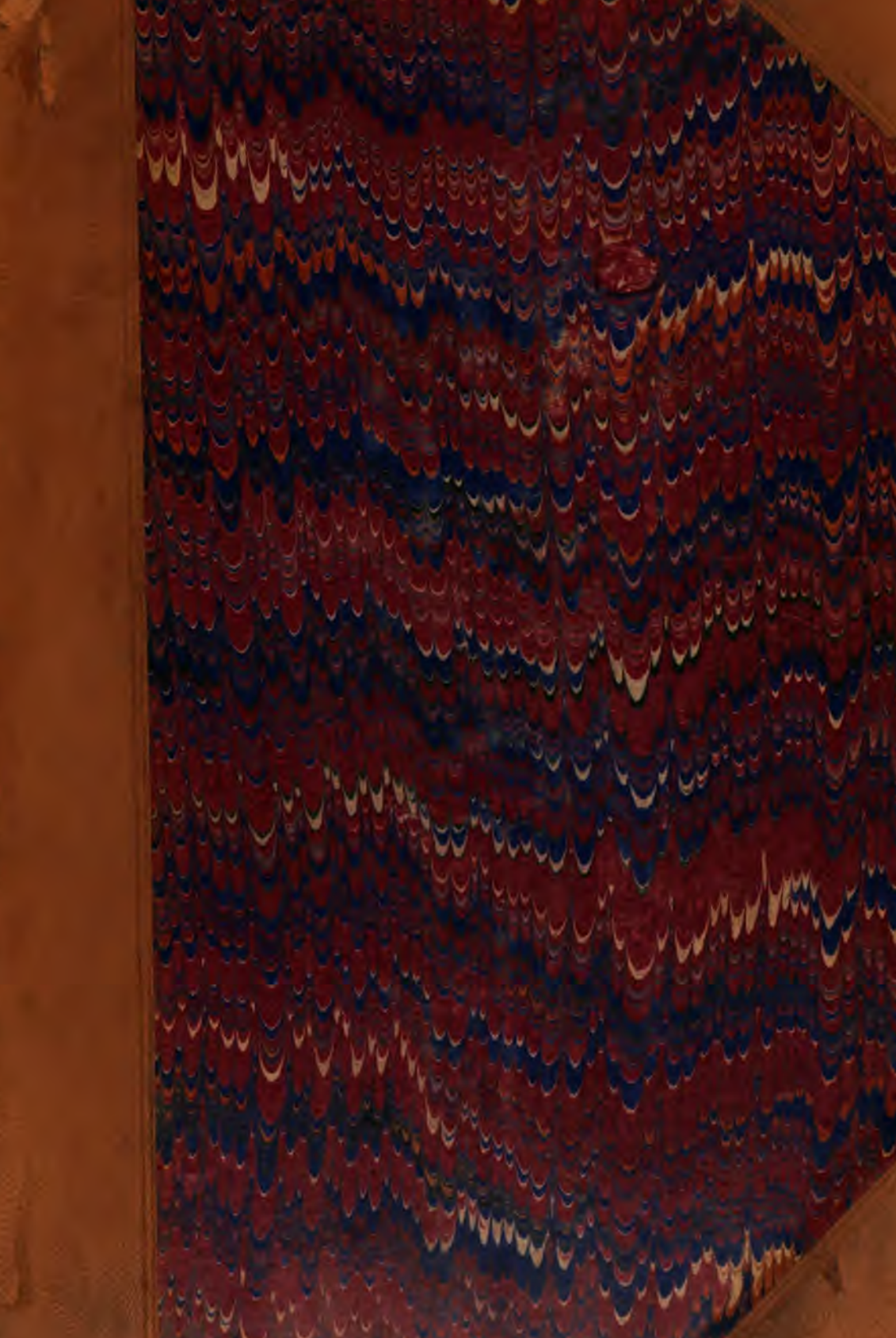
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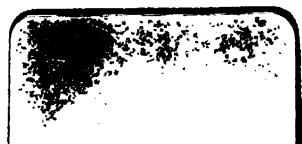
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THE  
LEGAL NEWS

EDITED BY

JAMES KIRBY, Q.C., D.C.L., LL.D.

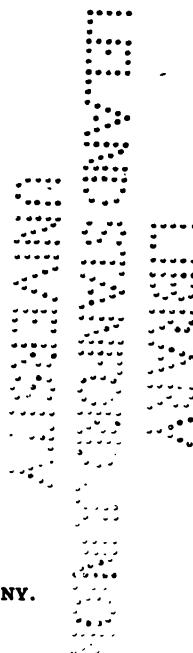
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Vol. XVII.

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MONTREAL:  
THE "GAZETTE" PRINTING COMPANY.

1894



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# THE LEGAL NEWS.

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VOL. XVII.

JANUARY 1, 1894.

No. 1.

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## CURRENT TOPICS AND CASES.

There are many who would refuse to apply to public persons a term so well understood as "thief," who yet do not hesitate to refer to them as "boodlers," a slang expression, "affecting," as the learned Chief Justice of the Superior Court happily expressed it, "to harmonize the comical and the infamous." Yet, it being proved that this term, so freely used in the newspapers and in private conversation, has acquired a definite meaning, and that "boodling" actually designates a species of thieving—the filching, by some means or other, by the "boodler" of that which does not belong to him—the Courts cannot refuse to recognize the defamatory character of the term, nor hesitate to hold that an action lies for the use of it. Such was the decision of the Court of Review at Montreal, Nov. 4, 1893, in *Marchand v. Molleur*, unanimously affirming the judgment of Gill, J., in the Superior Court, which awarded \$500 damages for the unjustifiable application of this term to the leader of the Opposition in the Legislative Assembly of Quebec.

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Oscillatory legislation, it need hardly be observed, does not add to the dignity of the legislative body, or to its reputation for wisdom. The period of study prescribed

to a student who was also a graduate in law, for a long time was three years, which term was usually co-extensive with the curriculum of the law faculties. Then the term was extended to four years. This, we are disposed to think, was a change beneficial in its effects. But during the last session of the Quebec Legislature, it appears that the term has been shortened once more to three years. When it is considered that the student of to-day has a much greater field to traverse than his predecessor of half a century ago, it is hard to believe, in the majority of cases, that he can, in so brief a period, come adequately prepared to the portal which admits him to practice. The experience of many advocates of distinction might be cited, all pointing to the conclusion that young men usually come to the bar too soon. The impatience of youth is natural enough, but the result of yielding to it is beneficial neither to them nor to their clients. At present, with four years' preparation, only fifty per cent. of the candidates pass the examinations. Does this state of things justify a reduction of the term of study?

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One of the facts which strongly arrest popular attention is the hardship of a bill of costs added to a petty debt of a few dollars which the debtor, through sickness or otherwise, is unable to pay. At one time we were disposed to think it would be better to deny the right of action for any sum under five or ten dollars. This would stop credit orders, and tend to establish the habit among the poor of buying only for cash. It is obvious, however, that such a rule would produce much embarrassment in its application, and that numerous exceptions would have to be made in regard to unpaid balances of larger debts, interest on loans, constituted rents, and the like. It is doubtful, moreover, whether it might not, on the other hand, encourage the giving of credit to an amount sufficient to enable the creditor to bring an action. In some cases, too, it would prevent a person temporarily

distressed from getting a necessary credit, though he might be able on the morrow to acquit the debt. Another proposition, submitted in a bill to the Quebec Legislature last session, is to abolish attorneys' fees in cases under \$25 or \$50. This would mean, in most instances, that the creditor, who frequently, in point of wealth, is but a little better off than the debtor, would have to pay his own attorney, and the hardship would simply be shifted from one to the other. The obvious inference is, that we must not expect to cure every evil by statute. Legislation can never supersede nor render superfluous the suggestions of kindness and charity in human relations. In uncontested actions for small amounts, however, the fees and disbursements have been too large, and should be reduced, and the expenses attending executions and the attachment of wages should be made as light as possible.

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We notice that the work of Mr. J. J. MacLaren, Q.C., on "Bills and Notes" has been substituted for Chalmers on Bills in the curriculum of the Toronto Law School. This is a merited recognition of the value of Mr. MacLaren's work.

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*Jones' Constables' Manual* is the title of a little work issued by the Carswell Company (Ltd.), Toronto, the second edition of which, compiled from the new Criminal Code, is now presented to the public. In alphabetical order of subjects, it states the law in regard to the offences with which constables have most frequently to deal. Montreal policemen should be furnished with a manual of this sort.

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*The University Law Review* is a new college monthly, conducted at the University of the City of New York, under the supervision of Mr. Austin Abbott. The work is carefully edited, and the numbers already issued have a very neat appearance.

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The measure for the re-organization of the Courts in Quebec has been deferred till next year. The Attorney-General, in announcing the postponement, delivered a speech in which the subject is discussed in a very fair spirit. A portion of these observations will be found in the present issue.

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*FRASER v. MAGOR—SALE—APPARENT DEFECT—  
DELAY FOR INSPECTION OF GOODS—REASON-  
ABLE DILIGENCE.*

The following notes and authorities of Mr. Justice Pagnuelo in the case of *Fraser v. Magor*, R.J.Q., 1 C.S. 543, were not received until after the report had gone to press. As the case involves an interesting question of mercantile law, the text of the learned judge's opinion is inserted here. The Court held that the defect complained of (rust on herring) was an apparent defect, and that the buyer had not made an examination of the goods within a reasonable time.

PAGNUELO, J.:—The plaintiff claims from the defendant the value of 49 barrels of No. 1 Labrador herring which he found, after inspection, rusty and unmerchantable, out of a lot of 187 barrels delivered to him, and which formed part of 321 barrels, bought by plaintiff from defendant on the 18th November, 1891, through a broker; while defendant denies all responsibility for the quality of the fish, were it unmerchantable at the time of the sale, which he denies; alleging in effect that the fish was sold without guarantee as to quality or condition and subject to inspection; that the plaintiff was negligent and late in his inspection of it, thereby assuming all the risk as to quality or soundness; that the terms were spot cash, meaning immediate payment, and that all claims for shortage or unsoundness should have been made, according to the custom of the produce trade, within two days from the date of delivery, while plaintiff remained for twelve days, from the 18th to the 30th November, without inspecting, and until the following day without complaining.

From the evidence and correspondence adduced, the following facts have been proven, namely: By the bought and sold note, the defendant sold to plaintiff, on the 18th November, 1891,

through John Smith, broker, 173 barrels No. 1 Labrador herrings at \$5.50; 29 barrels at \$5.50; 20 barrels No. 1 shore herrings at \$5; 32 barrels Sept. shore at \$5; and 67 barrels T. P. No. 1 shore at \$5, the whole stored in M. Davis' warehouses; terms, spot cash, less 2 per cent. On the same day, three delivery orders on M. Davis were given by defendant to plaintiff for the full amount of 321 barrels of above-described herrings; an invoice was also sent for the same; on the 24th November plaintiff wrote defendant asking his patience for the settling of the account and for the examination of the fish, saying he had had no time yet to make such examination. Defendant replied that if he had not examined the fish bought, it was his own fault; and although he might wait a day or two for the payment, he would recognize no claim for quality after this; requesting also a cheque on the next day for \$1,000 on account.

On the following days the plaintiff made three payments to defendant on account of said sale, namely, on 26th November, \$500; on 28th November, \$250; on the 30th November, \$250. On this last date, 30th November, plaintiff had seven barrels examined, and on 1st December he wrote defendant that out of seven barrels examined, three were found to be far from No. 1 fish; he would take no rusty or tainted fish; he would examine every barrel and leave out objectionable ones; however, he would return orders on payment of the \$1,000 already paid. In his answer of same date, defendant protested that the quality, condition and size were out of the question. The sale had been had on 18th November, and should have been repudiated at the most within two days; the sale was not made subject to selection; plaintiff was therefore requested to pay the balance, otherwise the defendant would protect himself by disposing of the fish and charging plaintiff with the loss, deducting the \$1,000 in question. Another letter from each party was sent on the same and following day, reiterating their pretensions, and defendant wrote Moses Davis suspending the delivery orders given to plaintiff, on account, as he says, of difficulties between them as to the payment. Defendant began to sell, as intimated, on the 2nd December, and continued to sell by small lots until 18th January. The balance of 33 barrels was not sold until April, and had to be sent to Chicago, netting only \$13. Coming back, on the 10th December, plaintiff protested defendant, tendering \$706, balance of purchase price, demanding delivery according to

the terms of the broker's note, of sound, clear fish, or the refunding of the \$1,000.

On the next day, the 11th December, defendant delivered to plaintiff a warehouse receipt for 187 barrels, to cover the amount paid, offering to deliver the balance, on payment of the purchase price, less any barrels that might have been sold. At this time only 20 barrels had been disposed of. Plaintiff's firm accepted and kept the warehouse receipt, notifying defendant that the survey would be delayed until the return of plaintiff from his brother's funeral in Chicago. On the 12th December, defendant again refused to recognize any claim on account of the quality of the fish, and informed plaintiff that he would continue to sell on his account. On the 19th December, the day following his return from Chicago, plaintiff caused an examination to be made of the 187 barrels in Moses Davis' store, by a cooper named Coté, who only finished on the 29th December, finding 47 barrels rusty, one tainted, and one containing only salt and pickle, of which fact he apprised defendant by a letter of 30th December. On the 4th January plaintiff notified defendant that a survey would be made the following day of the 49 barrels by two merchants of Montreal, who did so, in the absence of defendant, with the same result as Coté.

As to the custom of the fish dealers in Montreal it seems to be that the intending purchaser examines the fish before closing the bargain and accepting the bought note from the broker, for which purpose a short delay of a couple of days is allowed; or that he examines the fish within a short delay after delivery, no fixed time being determined; the delay is longer between dealers or wholesale merchants and retailers than between consignees and wholesale merchants; the time allowed is a reasonable but short delay on account of the perishable nature of the goods.

Some wholesale merchants, while dealing with retailers, are very lenient as to time; in fact, some will make an allowance whenever they are satisfied that the claim is fair and honest, even after three or four weeks or months; but this is rather with them a matter of policy than of right, and cannot be accepted as a rule for the court.

The principle is, that the inspection must be made within a reasonable but short delay, according to circumstances. The good faith of the seller may be taken into consideration, if he were the packer and knew of the inferior quality of his goods. The

lateness of the season, should it seriously interfere with business, might, perhaps, be considered also, although we read that a buyer "cannot relieve himself and charge the seller on the ground that the examination will occupy time, and is attended with labor and inconvenience. If it is practicable, no matter how inconvenient, the rule applies."<sup>1</sup> We may also mention the forbearance of the vendor, were he disposed to wait or had he waived all objection to delay. There is no saying how circumstances may shorten or prolong the time; but forbearance, as a matter of friendship or policy, cannot be accepted as a criterion, when a merchant stands on his strict rights, and the buyer is informed of such intention. The custom is also to examine a few barrels, say about one in ten of a large lot, and to take the chance of the inferior barrels that might be found in the lot; in other words, the sale is not made subject to selection of the good fish and rejection of the inferior fish, unless so agreed, or unless a guarantee be stipulated or be implied by the terms of the contract. It is accepted that four or five barrels in 100 may be under the mark, but 49 out of 187 is beyond all proportion.

The herring sold was open to inspection by plaintiff at the time of the sale; delivery orders were handed to him at the same time by defendant. Plaintiff delayed until the 30th November before making any inspection, without any other cause than want of funds to pay and press of business, although aware of the custom of trade to the contrary, and although formally notified by defendant, on the 24th November, that no claim on account of the condition or quality of the fish would be entertained by him. The forbearance asked by plaintiff on the 24th November for payment and inspection was denied by defendant, acting strictly on his legal rights. As for the press of business, plaintiff desired to have one Holland, cooper, to act for him. Holland was engaged otherwise, but any cooper would have done as well, and I don't see that there was such a press of business as to interfere with the inspection.

It must also be remarked, further, that the defendant had not packed said herring; he had only received it as consignee, and had reason to believe it good and sound at the time of the sale. Ten barrels had been sent as sample, five of Labrador No. 1, and

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<sup>1</sup> Per Justice Davis, in *Barnard & Kellogg*, Wallace's Rep. U. S. S. C., X., 388.

five of Shore No. 1. They were first-class fish. After the consignment had arrived, and while on the wharf, some four or five barrels had been opened for Mr. Robert P. McLea and examined by him; some fish showed signs of oil, which is preliminary to rust, and he declined to buy, as it would not suit his trade. This was a few days prior to 18th November. It is possible that the rust may have developed shortly after, between the 18th and 30th November, and specially between the 18th November and the end of December, when the 187 barrels were examined. At the time that the barrels were brought into the warehouse some hoops were found faulty; the barrels were mended and pickle added to some, as it is generally the case. No. 1 Labrador herring being fat, is more liable than other herring to show sign of oil and to rust, and it requires more care and looking after.

Sign of oil is not rust, and rust might yet have been prevented by adding good pickle. Côté found many barrels wanting in pickle; the barrels had been unattended to from the 18th November up to the 19th December, a time long enough to greatly injure fat herring, short of salt.

On the 30th November, out of seven barrels opened, two were found rusty and one short of salt. Had the two become rusty since Mr. McLea had opened four or five barrels on the wharf? No one can tell. The opinions of traders vary on this, as men's opinions do in most things, and we are left in the greatest uncertainty.

Again, forty nine barrels, opened between the 19th and 30th December, were left open, standing on end, until this action was instituted, on the 3rd March following. They are there yet.

All herring left open standing on end, especially fat herring, will depreciate in a very short time; although the evidence is contradictory on this point as on all others. There is no doubt, though, that it will, should it be left short of pickle.

On the whole I find, as a jury would do, that the herring was open to inspection at the time of the sale; that six days after the sale and delivery plaintiff asked for delay to pay and inspect, and was denied time to inspect and requested to pay; that he made three partial payments after this without inspection; that he only complained about the quality of the herring on the 1st of December; that in the meantime the fish may have deteriorated, and the complaint was late and tardy and beyond a reasonable time.

Coming to the terms of the bought note, and to the question of selection raised by plaintiff in his correspondence, and that of guarantee on which it hinges, I find that there was no express or implied guarantee as to every barrel in the bought note. The words used—"Labrador No. 1," "Shore No. 1"—are only descriptive of the class of goods; and although they imply a guarantee that the herring is good and merchantable, that guarantee is exhausted by the neglect of the buyer to examine at the time of delivery or within a reasonable short delay afterwards. If he chose to buy without examination, he must take the chance of his course.

An important consideration for us is that rust on fish is an apparent defect, which might have been discovered had the fish been examined, and that the vendor is not responsible for apparent defects which the buyer might have known of himself. (Art. 1523 C. C.)

The principle laid down in this article of our Civil Code is plain; it says: *caveat emptor*. Before buying see what you buy; if you choose to buy without looking, it is your own business. The law supposes that the buyer has seen the article sold, and that he buys it as it is. Should fraud be used to deceive the buyer as to the quality of the goods, or should latent and unapparent defects depreciate the value of the article, the law will protect the buyer; but he who buys without seeing when he has an opportunity to do so, buys at his own risk; *caveat emptor*. This doctrine is based upon common sense, and is the law of all nations.

When a delay is allowed for examination after the bargain is struck, advantage must be taken of that delay with all due diligence, as commercial transactions cannot be held in suspense for a long time, especially when they relate to perishable goods. The uncertainty, in this case, as to the condition of the herring on the 18th November, and whether rust has not developed afterwards, either of itself or through absence of proper care and attention, shows the full force and value of the rule, that he who neglects to act must suffer rather than he who can be reproached with no act or omission.

Finally, after all these delays, from the 18th November down to 5th January, 1892, when the last survey was made, plaintiff remained inactive for two months more, and it was not until the 3rd March following that he took out the present action, leaving in the meantime the barrels open, standing on end, and rotting

very probably. This is not showing due diligence, and on the whole, I feel no hesitation in dismissing this action with costs.

I refer the parties to the following authorities and precedents :—*Buntin & Hibbard*, 10 L. C. J. 1, in appeal; *Vipond & Findlay*, M. L. R., 7 S.C., 242; *Lewis & Jeffrey*, M. L. R., 7 Q. B. 141; *Barnard & Kellogg*, 10 Wallace's Rep. S.C. of U.S., 388.

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### THE RE-ORGANIZATION OF THE COURTS.

The following observations were made by Attorney-General Casgrain in the Legislative Assembly of Quebec, on the 12th December, in moving the reference of the Judicature Bill to the Committee on Legislation :—

*Mr. Speaker*,—The motion which I intend to propose to-day is not the one which is entered on the orders of the day. The motion on the orders of the day is for the second reading of the bill. When I will have concluded the few remarks I have to make, I will move that the order of the House for the second reading of the bill be discharged, and that the bill be referred to the Committee on Legislation. Last year, Mr. Speaker, I stated that I hoped the bill which I presented would not be considered as a party bill, but that the House would study it with the greatest attention, so as to see whether the measure not only meets the approval of the House and of the country, but also if it is sufficient to relieve those who complain of the present system. I regret that an illness of nearly a fortnight has prevented me from bringing the question before the House until to-day, and thereby giving the House an opportunity of more deeply studying the measure which I had the honor to submit.

The invitation which we made last year to the bar, the magistracy and the boards of trade to study the bill, has been accepted, it is true, but accepted very late. I had asked here in the House that the invitation be accepted at least before the first of July, 1893, so as to give us time between that date and the beginning of the session to study the suggestions which might be made, and put into practice the observations which might be submitted to us on the bill in question. The fact is that the discussion on the bill commenced only about the beginning of the session. Seeing that the various sections of the Bar, the majority of these sections, had not studied the bill, the Government deemed it advisable to convene here the delegates of all the sections of the Bar and the members of the Bar of the principal cities of the province to study the bill with me. This invitation was accepted, and all the sections of the province, as well as the members of the Bar of the leading cities of the province, did me the honor of meeting me here. We studied the bill for a whole day, a day very laboriously filled, and we were enabled to see what

the general feeling was, at least that of the legal profession. It has been stated that the entire legal profession is opposed to the measure. I cannot allow that statement to go uncontradicted.

We had here, for instance, the authorized representative of the section of the Bar of the district of Quebec, Hon. Mr. Langelier. There was only one detail in the whole bill to which the Quebec Bar objected. This was the provision which said that when the city judges would disappear, they would be replaced by those appointed to perform their duties in the country. With that exception, Mr. Langelier gave his adhesion to the bill, and in that he represented, as I have already said, the section of the Bar of the district of Quebec. We had also the Bar of Rimouski, represented by Mr. Pouliot, and the Bar of the district of Beauce, represented by Mr. Linière Taschereau. These gentlemen declared themselves in favor of the bill. It is true that the sections of Three Rivers, St. Francis, Bedford, St. Hyacinthe and St. Johns were opposed to the bill, and the Montreal Bar was represented by a gentleman who said he was authorized to oppose the bill. But I would like to call the attention of the House to what happened at the Montreal Bar.

The question was discussed for some time, and one of the most distinguished advocates of Montreal, a gentleman whom I am glad to count amongst my friends, Mr. Globensky, was instructed to draw up a report against the bill, that is to say, on the bill and not *against* it; because at the first meeting of the Montreal Bar, if I am properly informed, the question was considered without any decision being come to either for or against the measure. Mr. Globensky, who was instructed by the council to draft a report, made a report against the bill. When the Montreal Bar was convened to take Mr. Globensky's report into consideration, there were only twenty-three members present out of over three hundred, and the vote stood thirteen against and ten in favor of the measure. I am pleased to be able to tell the House that distinguished men such as Mr. Geoffrion, Mr. Gustave Lamothe, Mr. Demers, Mr. Eugene Lafontaine, whom we have known to such advantage in this House, have declared themselves in favor of the bill. I say this merely to remove the impression that the whole Bar is opposed to the bill. I am still, at present, receiving letters from everywhere from my brother advocates, asking me not to refer the bill to the Committee on Legislation, but to have it passed this session.

Moreover, amongst the resolutions and petitions laid on the table of the House as supplementary to the return to an order of the House for copies of all correspondence on the subject, we laid on the table a great many petitions lately received from ratepayers of the province, from ratepayers of certain *chefs lieux*, from important localities in the province, asking us to have the bill passed. There is a reason which, above all others, favors the proposal I now make, viz., to refer the bill to the Committee on Legislation for further study. The honorable the members of the House have observed that the draft of the Revised Code of Civil Procedure, so long and so anxiously expected, has been laid, in both lan-

guages, on the members' desks, and they have observed that that bill contains, in its first articles, provisions respecting the organization of the courts of the Province of Quebec. It could not be otherwise with a code of procedure, because a code of procedure cannot be complete, nor can it contain all that it should contain, if it do not contain the organization of the courts of the Province of Quebec. Now, we have reached, in the labor of revising the Code of Procedure, which we are now doing, about half the work, and the other half, as I will state in a few days, will be laid before this House at the beginning of next session. I even hope, if the House will permit, to be able to distribute the other half of the Code of Civil Procedure during the recess, so that it would not be possible, or, at least, it would not be prudent, to pass a bill this year reorganizing the courts of the Province of Quebec without, at the same time, passing the Code of Civil Procedure, because both bills are co-relative, are closely connected with each other. And when we come to discuss a proposition affecting the organization of the courts, it will be seen that it at once connects itself with another provision of the Code of Civil Procedure which deals purely and simply with civil procedure. As we cannot hope that the code of civil procedure will be adopted this session, I say that this is another reason why the bill should be referred to the Committee on Legislation so that the Committee may study it, if deemed advisable, or defer its consideration to next year—in a word so that it may do what the speech from the throne said we would do this year, that is, study the bill in question. After these few remarks, I have not much to add to what I said in my speech of last year. Nevertheless, as some of my brother advocates, some sections of the Bar and some newspapers have done me the honor of thoroughly discussing the bill, I consider that it would not be proper for me to allow to pass unnoticed the remarks kindly made to me in the very best spirit, without discussing them and seeking to ascertain their value.

*The Plan of the Bill.*

But before proceeding to these remarks I think it is but right that I should at present once more explain the general plan of the bill, so that the House may fully understand the question, may fully understand the principle at stake, may fully understand the outline of the bill, and be then in a position to study it with a full knowledge of the subject. If we refer to section 2 of the bill it will be seen that the courts of the province in civil, criminal and mixed matters are :

1. The Court of Queen's Bench :
  - (a) Sitting in criminal matters :
  - (b) Sitting in appeal.
2. The Superior Court.
3. The District Court.
4. The Commissioners' Court.
5. The Court of Sessions of the Peace.
6. The Court of Justices of the Peace.

## 7. The Recorder's Court.

I wish to call the attention of this House only to the first three courts, viz., the Court of Queen's Bench, the Superior Court, the District Court.

*The Superior Court.*

What is the constitution of the Superior Court and what is its jurisdiction? The answer to this question will be found in sections 26, 27, 28 and 76 of the bill. Here are sections 26 and 27, which deal with the constitution of the Court. I will read them. I would first observe to the House that there is a printer's error in both these sections, a mistake in the figures. Thus, instead of 15 in the second line of section 26 we should have 16, and in the first line of section 27 instead of 9 we must put 10, so that the sections read as follows:

26. The Superior Court, which is a court of record, consists of fifteen (should be sixteen) judges, having jurisdiction throughout the province; that is to say, of the chief justice and fourteen puisne judges.

For the purposes of the administration of justice for the Superior Court, the Province of Quebec is divided into three parts:

1. The Montreal division, comprising the nine following districts:—Montreal, Ottawa, Terrebonne, Joliette, Richelieu, Beauharnois, Bedford, Iberville and St. Hyacinthe;

2. The Quebec division, comprising the ten following districts: Quebec, Three Rivers, Saguenay, Chicoutimi, Gaspé, Rimouski, Kamouraska, Montmagny, Beauce and Arthabaska;

3 The St. Francis division, comprising the district of St. Francis.

27. Nine (should be ten) judges of the Superior Court reside in or near the city of Montreal, and exercise their ordinary judicial functions in the Montreal division; five of the said judges reside in or near the city of Quebec, and exercise their ordinary judicial functions in the Quebec division; and one of the said judges residing in or near the city of Sherbrooke, and exercising his ordinary judicial functions in the St. Francis division.

Now, Mr. Speaker, it will perhaps be said: "That is the commencement of judicial centralization." I say no. I say that judicial centralization or decentralization does not result from the residence or non-residence of the judge, and I will explain later on what I mean by judicial centralization. If we refer to section 76 it will be seen that there is nothing in the constitution of the Superior Court to lead to the belief that I wished for an instant to centralize the administration of justice in the Province of Quebec. Section 38 of the bill reads as follows:

38. There shall be terms and sittings of the Superior Court and of the judges of this court, as often as the due despatch of business and the public convenience may require, at the *chef lieu* of each of the judicial districts of the province, at the dates and during the periods appointed by order of the Lieutenant-Governor-in-Council.

The sittings of the Superior Court cannot commence before nine of the clock in the forenoon, nor end after six of the clock in the afternoon.

Articles 21 and 22 of this act apply *mutatis mutandis* to the Superior Court.

The terms and sittings of the Superior Court and of the judges of that court shall be presided over by the chief justice or by one of the other judges of the court selected by the chief justice, and, in the division in which the chief justice does not reside, by the judge performing the duties of chief justice therein. R. S. O., c. 44, s. 94.

So that, Mr. Speaker, the organization of the Superior Court is this: You have sixteen judges of the Superior Court, ten of whom reside in Montreal, five in Quebec and one in the district of St. Francis. But all the cases which hitherto were heard in the various *chefs lieux*, all the cases which were argued in the *chefs lieux*, and which were decided there, will be heard, argued and decided there as they are at present. The terms of the Superior Court will be fixed, not by a rule of practice on which the judges will agree amongst themselves, as was the case under the old law; but they shall be fixed by the Lieutenant-Governor-in-Council according to public requirements. So that the judges will no longer sit for a few days when they please, but they will be compelled by a proclamation of the Lieutenant-Governor-in-Council which will state that on such and such a day they will be obliged to go and hear the cases at the *chef lieu* of each district. There is a paragraph in section 38 which may appear singular. It is the one which says that the court cannot commence before nine in the morning nor end after six in the afternoon. This paragraph was inserted at the request of several country advocates, who said to me: "If you compel a judge who resides in Quebec to come and hear cases at a country *chef lieu*, he will hurry through his cases as fast as possible so as to have done with them and get back to Quebec as soon as possible. He will sit until midnight if necessary to be able to get home by the next train, and by that means we will not be able to get that justice which we have a right to expect." The paragraph in question says that the court cannot commence to sit before nine in the forenoon nor end after six in the afternoon. In this manner the advocates are sure to have time to argue their cases, the witnesses will have all the time required to give their evidence, and the cases will be heard as justice requires them to be heard.

#### *The Court of Review.*

Now, as to the judgments of the Superior Court, the Court of Review continues as it now exists. The Court of Review is a court of review for Superior Court judgments. I was about to forget to say what I should have said at the very beginning, and that is that the Superior Court, as it exists according to the bill in question, is a Superior Court having jurisdiction in all cases in which the amount exceeds \$400. Thus, in all cases for an amount over \$400, the Superior Court, as it now exists, will have jurisdiction, and as regards the judgments of that court, the judges of the Superior Court so constituted, the Court of Review will continue to exist as at present. As everyone knows, according to the rules

of the Code of Procedure, one cannot go into appeal if the judgment of the Superior Court is confirmed by the Court of Review. I have retained this provision in the bill, but suitors are free to choose between the Court of Review and the Court of Appeal, and the judgment of the Superior Court may be taken at once into review or into appeal. If the judgment is reversed by the Court of Review, the appeal still lies under the rule which at present exists in the Code of Civil Procedure. So much for the Superior Court. To resume, and I specially call the attention of the members of this honorable House to this point, there is no judicial centralization. Judicial centralization would consist in the fact of our having in Quebec and Montreal, in the large centres, the hearing and trial of cases, and compelling suitors to come to the large centres. But under the bill as I submit it, it is the judges who, as it were, go to the suitors. They go to the *chefs lieux* as they do now and justice goes to the suitors.

#### *The District Court.*

I now come to the District Court. Sections 45, 46, 47, 48, 49, 50, 54 and 56 give us the constitution and jurisdiction of the District Court. It has jurisdiction in all cases where the amount at issue does not exceed \$400. Hitherto, it was the Superior Court which had jurisdiction in all cases from \$100 to \$400; now in all cases in which the amount does not exceed \$400, it is the District Court which has such jurisdiction. Where does this court sit, and how is it composed? The District Court, says section 45, has and exercises the same jurisdiction, functions and powers as the Circuit Court had, and in cases not exceeding \$400, which were within the jurisdiction of the Superior Court, it has the same jurisdiction, functions and powers as the Superior Court, to the exclusion of the latter. The District Court consists of twenty-six judges, who are distributed throughout the province as follows: Seven of the District Court judges reside in or near the city of Montreal; three reside in or near the city of Quebec, and, with the exception of the district of Saguenay, which is served by the judge of the district of Chicoutimi and Saguenay, each *chef lieu* has a resident district judge. Thus, in every district *chef lieu*, as it now exists, there will be a resident district judge having jurisdiction to the amount of \$400 inclusively. Consequently, it may at once be seen that if it could, by accident, be said that there is judicial centralization in the constitution of the Superior Court, there is decentralization in the case of the District Court; and I would add that there is even greater decentralization than now exists. If we refer to sections 54 and 56 of the bill, it will be seen that, with the exception of the counties of Hochelaga, Jacques Cartier, Laval, St. Maurice and Quebec, the District Court may be established not only in each county *chef lieu* or county seat, not only in each place where the Circuit Court now sits, because it is well known that in some counties there is more than one Circuit Court, but under these sections of the bill in question the District Court may sit in more than one place in the same county.

What is the object of this provision? At present you have extensive

tracts of country which were not inhabited when the Act of 1857 was passed. You have, for instance, the vast region of Lake St. John. You have the great region to the north of Montreal, and you have other regions in the province where there are no courts, where there is not even a circuit court, and where witnesses and suitors have to come at great expense to the county *chef lieu*. Thus, Mr. Speaker, you have, for instance, in the District of Three Rivers, the important county of Nicolet, which is separated from the remainder of the District of Three Rivers by the River St. Lawrence, and for many weeks in the spring and autumn these people cannot cross over to Three Rivers to attend to their law business. You have, likewise, other regions in the county of Ottawa which are similarly situated. I am constantly requested to establish Circuit Courts in these places, but with the law as it now stands the Circuit Court cannot be established there, because not more than one Circuit Court can be established in a county. Consequently I was right when I said that under my bill there is more judicial decentralization than there was under the old system.

*Appeals from the District Court.*

I now come to appeals from the District Court. Complaints have been often made that in our system of organization of the law courts there are too many appeals and too many degrees of appeal. Thus, to give an example, at present a case of \$100 is taken out before the Superior Court. This case goes into review. Let us say that the judgment is reversed; the losing party can take the case into appeal. Matters are such that in the smallest case, in a case of \$100, the costs, when there are no witnesses, amount to \$600, and may amount to \$800, and all this when the amount at issue is only \$100. I say that we must protect the suitors against themselves. The ratepayers of the Province of Quebec must be protected against the perhaps too strongly developed desire which animates them to plead and plead until their means are exhausted. That is why I propose to reduce the number of appeals and the number of degrees of appeal. Now, there is another drawback arising from the too great number of appeals. It is what has happened in Montreal, where the Court of Appeals is so encumbered that if a case is inscribed to-day for hearing it cannot be heard for two years. The result of this is that the dishonest suitor is protected when he wishes to plead and to carry the case into appeal. If I am well informed, cases are taken into appeal—a number of cases are taken before the Court of Queen's Bench—merely to obtain delay, to avoid paying just debts which are due. The Court of Appeal for the District Court would be the Court of Review, consisting of three judges of the Superior Court as at present. These cases would therefore be taken into appeal before the Court of Review, which would be a court entirely distinct from and independent of the District Court.

[To be continued.]

# THE LEGAL NEWS.

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VOL. XVII.

JANUARY 15, 1894.

No.

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## CURRENT TOPICS AND CASES.

In *Ogilvie v. Farnan*, M.L.R. 5 S.C. 380, the Court of Review at Montreal, held that the effect of a judicial abandonment made by a debtor in prison under *capias* is to entitle him to his liberation; and the Court has no power to detain him after he has undergone the imprisonment imposed for fraud, on contestation of his *bilan*. This decision has been still further extended by the recent case of *Chartrand v. Campeau*, also decided by the Court of Review at Montreal, on the 30th September last. In the latter case the Chief Justice, and Justices Jetté and Pagnuelo, sitting in review, affirmed the decision of Mr. Justice Taschereau, holding that Article 793 of the Code of Procedure, which says that a debtor may obtain his discharge by the abandonment of his property, applies generally to all coercive imprisonment, including that imposed by Article 782, *i.e.*, for *rebellion à justice*. This decision is as broad as possible. In *Chartrand v. Campeau* the judgment of coercive imprisonment, ordering the defendant, in the terms of Article 782, to be imprisoned until he should satisfy the judgment, had been rendered after he had made an abandonment of all his property, but the *bilan* was being contested at the time on the ground of fraud, and before the defendant petitioned for

his liberation he had undergone a sentence of ten days' imprisonment for fraud. "As our law now stands," the Chief Justice observed, "the relief of debtors and the punishment of fraud have been substituted for life imprisonment, while, at the same time, the creditor's rights extend to a complete discussion of his debtor's property, and to keeping him in the jurisdiction for that purpose."

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The case originally submitted to the Ontario Court of Appeals by the Government of Ontario, with regard to the power of local legislatures to pass prohibitory liquor laws, has now, with the consent of the Minister of Justice, been placed before the Supreme Court of Canada, and may be argued next month. The case is as follows:—

1. Has a provincial legislature jurisdiction to prohibit the sale, within the province, of spirituous, fermented, or other intoxicating liquors?

2. Or has the legislature such jurisdiction regarding such portions of the province as to which the Canada Temperance Act is not in operation?

3. Has a provincial legislature jurisdiction to prohibit the manufacture of such liquors within the province?

4. Has a provincial legislature jurisdiction to prohibit the importation of such liquors into the province?

5. If a provincial legislature has not jurisdiction to prohibit sales of such liquors, irrespective of quantity, has such legislature jurisdiction to prohibit the sale by retail, according to the definition of a sale by retail either in statutes in force in the province at the time of Confederation, or any other definition thereof?

6. If a provincial legislature has a limited jurisdiction only as regards the prohibition of sales, has the legislature jurisdiction to prohibit sales subject to the limits provided by the several subsections of the 99th section of "The Canada Temperance Act," or any of them?

7. Had the Ontario Legislature jurisdiction to enact the 18th section of the act passed by the Legislature of Ontario in the 53rd year of Her Majesty's reign and entitled "An act to improve the Liquor License Acts," as the said section is explained by the act passed by the said Legislature in the 54th year of Her

Majesty's reign, and entitled "An Act respecting Local Option in the matter of liquor selling."

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The calendar for the January term of the Court of Appeal at Montreal shows a slight falling off, the list having dropped to 99 cases. It may be observed that the attorney-general has not been quite accurately informed as to the arrears in this Court. He states that an appellant must wait two years after a case is inscribed. One year would be nearer the mark. There are five terms in the year; the 99 cases now inscribed would occupy about four terms, and the privileged cases interposed take portions of time equal to another term. So that the actual delay is about one year. After cases are heard judgment is always rendered very promptly.

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Mr. Crankshaw's elaborate and valuable work on the Criminal Code of Canada has been published by Messrs. Whiteford & Theoret, of Montreal. We shall notice it in our next issue.

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#### *THE RE-ORGANIZATION OF THE COURTS.*

The following is the conclusion of Attorney-General Casgrain's observations (see p. 16 *ante*):—

At present it is often said—I do not say rightly said, but the impression is rather general—that the Court of Review is more a court of confirmation than of revision; that is to say, that, owing to I know not what chain of circumstances, the judges of the Court of Review are much more led to confirm the judgments of their colleagues than to reverse or modify them. Now, when an appeal is taken from the judgment of a District Court judge to the Court of Review, there will no longer be amongst the members of the various courts that fraternity, if I may so express myself, which exists between those who compose the same court. There will perhaps not be more independence, but, at least, there will perhaps be a little more independent action when judgments rendered by District Court judges have to be reversed or modified. It is true that the Court of Appeal so constituted by the bill consists of only three judges. But let us see what happens in the Province of Ontario, which is often quoted as a model province, and which, in many respects, is admirably managed in all public and judicial matters. In Ontario the Court of Appeals for

cases in which the largest amount is at issue consists of only four members, and I say that, for cases of \$400 or less, a Court of Appeals consisting of three judges constituting an independent tribunal is sufficient.

*Appeal from the Court of Review.*

When the judgment of the Court of Review sitting in appeal from a judgment of a District Court is not unanimous, an appeal may be taken from the Court of Review to the Court of Queen's Bench. I admit that I had some hesitation in introducing this amendment. I am not yet decided to state—I am not yet sufficiently convinced to be able to say—that this is a wise provision, because I am of the opinion of many authors who have written on this subject, and who say that the number of appeals and the number of the degrees of appeal should be reduced. But that is a question on which there may be a difference of opinion, a question on which something may be said both for and against; it is a question which I submit for the serious consideration of those who will have to study the bill. I say that, not only in virtue of the bill which I have just explained will the appeals from the District Court render a service to suitors, but the law will have the effect of greatly reducing the number of appeals now taken before the Court of Queen's Bench, and will give greater efficiency to the Court of Queen's Bench, and will allow it to better fill the role which it is called upon to fill in the judicial organization of this province.

*District Judges in Criminal Matters.*

Now there is, in the constitution of the District Court, another very important matter to which I specially call the attention of the members of this House. According to section 47 of the bill the District judges have jurisdiction throughout the whole Province of Quebec, but exercise their ordinary judicial functions in the districts assigned to them by their commissions; and they further have all the powers and exercise all the functions mentioned in articles 2455 to 2544 inclusively of the Revised Statutes of the Province of Quebec. If you refer to section 107 you will see this: "As district judges are appointed in the different districts, the judges of the sessions of the peace, district magistrates and stipendiary magistrates shall cease to exercise their functions." That is to say, sir, that I give the district judges all the powers of district magistrates in criminal matters and all the powers of judges of the sessions of the peace, in Quebec and Montreal. A considerable economy will result from this. At present the expenses of the province for district magistrates, travelling expenses, etc., for the salaries of judges of the sessions of the peace, amount to \$30,000. But what happens? Every day I receive petitions and letters asking me to establish magistrates' courts, asking me even to appoint other magistrates for regions distant from the *chef lieu*, like those I mentioned just now, and I have no hesitation in saying that if the present system continues, in three or four years we will be obliged to appoint other district magistrates, and to give them further powers, to meet the ever increasing wants of the public; and the expenditure under

this head will amount to \$50,000 per annum, at least, and will go on increasing. There is also another consideration, and that is that the present salary of the district magistrates is not sufficient. The salary of these magistrates who, after all, are called upon to exercise important judicial functions in criminal matters, is not sufficient. It is only \$1,200, and this has been so understood that for seven or eight years it has been necessary to indirectly increase the salary of the district magistrates by giving them travelling expenses of from ten to five dollars a day, which greatly increases the expense of the administration of justice. I do not say that it was wrong to do so. I believe, on the contrary, that it is impossible to get a competent man to perform judicial duties of such importance for the small salary of \$1,200 per annum. We will therefore be assuredly compelled to increase the salary of these magistrates if they are to continue to exist, or we will be obliged to replace them by other magistrates or other judges, and I think the plan I propose is the best. Now, if this expenditure is to be \$50,000 per annum, as it will soon be, I ask myself why the Province of Quebec should pay the expenditure in question. We complain so much of the expense we incur. We clamor so much for economy. We endeavor by every means to reduce our expenditure. Now, here is a favorable opportunity for reducing the expense of the administration of justice by \$50,000; because, as everyone knows, sections 96 and 100 of the British North America Act say that it is the Federal Parliament which appoints the judges and pays their salary. I therefore ask myself why, in view of that provision of the British North America Act, the Province of Quebec should be obliged to pay \$50,000 for the administration of criminal justice. Thus, those who are in favor of economy cannot but say that, in this respect at least, the bill is a good one.

Now we have to consider how the bill is to be put into effect. In 1857, when the great statesman whom everyone admires, Sir George Etienne Cartier, introduced his measure for the reorganization of the law courts, it was comparatively easy to put the reform into practice. At that time the question was to appoint new judges, and, as everyone is aware, candidates for judgeships were not wanting any more in 1857 than they are now. Consequently, it was rather easy to appoint new judges. At the present time the question is to reduce the number of Superior Court judges from 30 to 16. If we wish to put the law into execution we would have to decapitate 14 of those gentlemen. Now, it is quite sure that they will not submit to decapitation without making considerable resistance. It is for that reason that one of the provisions of the bill, section 112, says that the act shall come into force by proclamation of the Lieutenant-Governor-in-Council. As soon as the proclamation is issued, this is what will happen: In the districts of Montreal, Quebec and Sherbrooke, as well as in the district of Terrebonne, whose judge will be transferred to Montreal, and in one of the districts near Quebec, whose judge will be transferred to Quebec, the law will come into force at once. District judges will have to be appointed at Quebec and Montreal, who will at once commence to perform their judicial duties. The district judges at

Montreal and the district judge at Quebec will replace the judges of the Sessions of the Peace and exercise the same functions of the judges of the Circuit Court exercised at Montreal and at Quebec, which functions are, by the bill, assigned to the district judges, as well as in the district of Terrebonne, and in one of the districts of the Quebec division, whose judge shall be transferred to the city of Quebec. The number of judges in Montreal will be considerable for some time; but it must not be imagined that it will take long for the law to come into force everywhere. Every one knows that, from ordinary causes, judges, like others, disappear pretty rapidly. Thus, the other day, a judge said to me: "I was appointed judge seven years ago, and already the majority of the judges are my juniors." As only twelve judges will remain, the law will come into force pretty soon. Now, while the ten judges of the Superior Court sit in Montreal they will not be obliged to go on circuit in many districts, and this will, in consequence of the increased number of judges, remove the congestion which now exists in the Enquête and Merits Court in Montreal, where considerable delay occurs at present.

#### *The Court of Queen's Bench.*

In virtue of the bill which I will introduce, the Court of Queen's Bench may sit with the assistance of some of the judges *ad hoc* or as assistant judges. As this court may sit in two different places, this will remove the congestion which exists in the Court of Queen's Bench, because if the Court of Queen's Bench were to sit at Montreal for two years it would barely be able to get rid of all the cases now inscribed before that court. Now, when in each district a vacancy occurs in the Bench of the Superior Court, such vacancy shall not be filled up, but the district shall at once come under the operation of the law which appoints district judges. Thus, let us take, for instance, the district of Montmagny. Let us suppose that the judge in the district of Montmagny, for one reason or another, ceases to exercise his functions there, either because he is removed by death or is promoted to a higher position. Immediately, under the law, the Federal Government will be obliged to appoint a district judge for Montmagny, and the Superior Court of Montmagny shall be served by one of the judges of the Superior Court residing in Quebec. Meanwhile, as soon as the proclamation is issued, the principle of the law comes into force everywhere throughout the province, so that the judges of the Superior Court now existing and exercising their functions in each district shall continue to exercise their functions as judges of the Superior Court for cases of \$400 and over, and the district judges shall have jurisdiction for all cases under \$400, except as regards the functions of district magistrates, which shall remain the same until district judges are appointed.

I would observe, in passing, that cases for over \$400 do not represent one-fifth of the work of the judges, while cases of \$400 and under represent four-fifths of the work. I give four-fifths of the work to the district judges, whose number is greater; on the other hand, for cases over \$400, which represent only one-fifth of the work, there are sixteen Superior

Court judges. Otherwise we would be obliged to appoint a Superior Court judge in each district. Now, in some districts there is not work for more than two months in the year, while in other districts there is work for the whole year and more. This is why, on the one hand, the number of judges for cases under \$400 must be increased, while, on the other hand, a special court must be established for cases of \$400 and over, a court which, sitting in review, shall be a court of appeal for the District Court.

*Provision for Summary Matters.*

But I was forgetting a very important provision of the law referring to the jurisdiction of district courts. I spoke a moment ago of judicial centralization and decentralization, and I said that all cases under \$400, which, up to the present, were pleaded and judged at the *chef lieu* of the district, would so continue to be in future. But the answer may be made, as it actually was in a memorial addressed to me: "There are cases which come daily before the courts, motions, peremptory exceptions, *défenses en droit*, business in chambers, writs of prerogative, summary affairs, etc. What are you going to do about them?" I admit that in the most of the rural districts, writs of prerogative, questions between lessors and lessees, actions under the law of summary procedure, are pretty rare; but nevertheless, in order that nobody may accuse me of at all encroaching upon this question of judicial centralization, I declare in section 48 that in all these matters that I have mentioned, and which are enumerated in this section, the district judge has jurisdiction, subject to appeal to the Superior Court. This question is rather one of procedure, and more the subject of an article of the Code of Procedure. It may therefore be seen what a disadvantage it would be to pass this Act without at the same time adopting the Code of Procedure.

A Member—In summary affairs, will the district judge have absolute jurisdiction, and will there be an appeal?

Hon. Mr. Casgrain—The appeal will be before the Superior Court sitting in review and before the Court of Appeal as now constituted, or before both, according to the rules which at present exist in the Code of Procedure.

*Changes since Last Year.*

I have indicated, so far, in making the general *exposé* of the bill, the principal changes which are proposed in the measure that I have to present. But to enable the House to better understand and more fully seize the difference between the measure originally submitted and that which I will have the honor to lay before the House, and in order to show the care that I have taken to listen to the complaints and representations that have been made to me, I believe that it will be well to give in a succinct and definite manner the changes which exist between the original bill and that now submitted. There is first and foremost in the present bill, as I have already declared, a complete elimination of everything regarding the administration of criminal justice. In last year's bill, at the suggestion of parties who were well informed, and who had at heart

the perfect administration of justice, the province had been divided into six districts for the purpose of the administration of criminal justice. But the remark has been made to me that it would not be just to bring witnesses from a distance to a *chef lieu* for a criminal case, on account of the cost and the inconvenience, and that neither would it be just to drag a criminal from a distance to a *chef lieu* in another county, there to stand his trial, where he might not perhaps be judged by his peers. I understood the justice of this observation, and that the bill in this respect was erroneous, and this year I have left the administration of criminal justice exactly as it was under the old law. That is the first change contained in the new bill, and a very considerable one it is.

*Judges and Terms of the Courts.*

Now the complaint was also made that according to the bill of last year the terms of the court were fixed, not by proclamation of the Lieutenant-Governor-in-Council, as proposed by the present bill, but by a rule of practice made by the judges themselves. It was said, with some reason, that the judges, not always consulting the public needs, might fix the terms to suit their own convenience rather than that of litigants. This objection is a strong one, and in this year's bill it is provided that the terms of all the courts will be fixed by proclamation of the Lieutenant-Governor-in-Council. It was also said in last year's bill that the district judges would be appointed from amongst the lawyers of not less than five years' practice. It was thought by some that this was not a sufficient guarantee of the qualifications of men charged with important judicial functions, and it is now provided that ten years of practice must be one of the qualifications required of those lawyers who are to be named judges of the District Courts. Another notable change and one which relates particularly to procedure, is that which I explained a moment ago, namely, that the District Court judge has all the powers of a Superior Court judge in chambers; that is to say, that he may decide all questions between lessors and lessees, all those under the act of summary procedure, writs of prerogative, in a word all the questions that I had the honor of mentioning to the House a moment ago.

*District of St. Francis.*

There will be sixteen judges of the Superior Court instead of fifteen. There will be ten at Montreal, five at Quebec, and one at Sherbrooke. It was considered that the district of St. Francis was of such importance, and that so much business was transacted there, that it was necessary to leave a judge there. And besides, Mr. Speaker, the bill provides that when there is too much work for a judge in any district, another judge by proclamation of the Lieutenant-Governor-in-council may be sent by the Chief Justice to sit there. The number of district court judges for the city of Montreal is also increased. Another important change that I have already pointed out to the House is this: That in virtue of article 1054 of the Code of Civil Procedure as amended by section 75 of the present bill, the District court, in whatever locality it sits, has jurisdiction

up to the sum of \$400. Last year we said that outside of the *chef lieu* the court would only have jurisdiction to the amount of \$100. This year we increase it to \$400 wherever it sits, even though it may be in two different localities in the same county, in order to give courts to the regions of which I spoke a moment ago, where they may bring their judicial affairs with the economy which they have a right to expect. There is, further, an appeal from the judgments of the District court. Last year we said that the judgment of the Court of Review would be final and without appeal, when pronounced upon an appeal from a judgment of the District court; but now, when the judgment of the Court of Review is not unanimous, the appellant may go to the Court of Queen's Bench. I have already pointed out this change.

*City and Rural Judges.*

And, finally, the last change in the bill has been made at the suggestion of the Bar of Quebec, and also of that of certain lawyers and judges who have written me on the subject. Last year, in the case of the death of one of the Quebec or Montreal judges, or of his disappearance for any cause, he was necessarily replaced by one of the country judges—a judge from the rural districts. That is to say that if, for instance, a judge died at Quebec, a judge was taken from one of the districts of the Quebec division and brought into the city. It has been represented to me that for the reasons that will be understood by those who are familiar with the administration of justice in this province, it was not altogether just that the Federal Government should be forced to name certain gentlemen judges in the cities. I have fallen in with this suggestion, and now, when the judges of Quebec or of Montreal will disappear the Federal Government may name the one that they may deem proper to fill the gap. Besides, Mr. Speaker, in thinking of it a little I am not sure that I am able, under the constitution that governs us, to impose upon the Federal Government the obligation of naming such or such judge to such or such locality.

*Objections to the Bill.*

I now come to the most interesting portion—if I may say that there is an interesting part—of my speech. It is that which concerns the objections made to the bill. These objections were naturally based on the bill which was presented to the House last session, which was that which was given publicity to. It could not be otherwise. People could only criticize what they had before them. The objections made were of two kinds. There was a general objection to the principle of the bill, and there were objections to certain details. I will say, without, I believe, flattering myself too much, that I have replied to all the objections of details that are made to the bill. I will go even further and say that I have incorporated in the bill all the suggestions contained in the memorials which have been sent me by the different sections of the Bar opposed to the measure. The bill has been corrected; it has been amended upon the strength of the memorials sent

me, and I believe that all the remarks that have been made upon it have been taken into consideration. Now, the great question, that upon which opponents of the measure have fallen back in order to fight the bill—the question above all upon which the opposition is made—is this: They say that judicial decentralization was established in 1857, and that this decentralization ought to continue; that my bill destroys it; that it strikes a blow at the principle of decentralization; that it overthrows the tribunals of the country and unites in the large cities the different judicial jurisdictions, and that in consequence the measure is not acceptable to the litigants of the province, and, above all, to those of them who live in the rural districts. I believe that after the explanation that I have made of the general plan of the bill, nobody will any longer be of the opinion that I am striking a blow at the principle of judicial decentralization. I have proved that the Superior Court will sit, according to the bill in question, in each *chef lieu* of district where it now sits, and I draw the attention of the members to this fact. Finally, I say this: judicial decentralization does not consist in the residence or non-residence of the judges. Decentralization does not consist in the fact that you send a judge to reside in each district. The system may possess some advantages, but, Mr. Speaker, judicial decentralization consists in the fact that the judge goes, so to speak, to the home of the pleader, visits his home, to hear there his complaints and the claims that he has to prefer. Decentralization consists in disseminating as much as possible, in all parts of the province, the administration of justice. Decentralization consists in the hearing of cases in the *chef lieu* of the district of the litigant, in the *chef lieu* of his county, in the parish in which he resides, even, if that is possible. This is what should be understood by judicial decentralization. Now, it is not because I say in the bill that the sixteen judges of the Superior Court shall reside in the city of Montreal, or of Quebec, or of Sherbrooke, that I interfere with the principle of judicial decentralization. No, because I respect the principle of the bill of 1857, in virtue of which it is said that the judges must hear cases, hear witnesses, hear the pleadings and render judgment in the *chef lieu* of each district. I go further. Not only will we have a Superior Court in each *chef lieu* of a district or county, but in large counties like Ottawa, Terrebonne, Nicolet and Rimouski we will have district courts which will have jurisdiction up to the sum of \$400. And I ask those who are in favor of judicial decentralization to aid me in pronouncing in favor of the bill, if they are really in favor of the dissemination of the administration of justice in all parts of the province that have a right to it. There are interesting figures to be given on this question of judicial decentralization and of the residence of the judges. There are to-day thirty judges of the Superior Court in the Province of Quebec. The residence of ten of these judges is fixed at Montreal, as everybody knows, and the residence of four others is fixed at Quebec. There remain then sixteen judges for the eighteen other districts. Now, the following districts have no resident judges, namely, Terrebonne, Joliette, Beauce, Montmagny, Rimouski, Saguenay and Richelieu, in all seven. There are then seven districts which have no

resident judge at all, and there are only eleven districts that have resident judges, and again, of these eleven, my friend, Mr. Gilbensky, who has written such interesting letters on the question, says that five of these judges sit almost continuously in Montreal. There only remain, then, under the operation of the actual law, six judges who reside actually and effectively in their respective districts.

Thus, then, Mr. Speaker, in requiring these judges of the Superior Court to reside at Quebec, at Montreal, and at Sherbrooke, I do not destroy what is to-day existing, and I do not lay a sacrilegious hand upon the principle of judicial decentralization, because if people are satisfied with the present system—only six judges residing effectively in their districts—and, consequently, if people do not complain of it, it is a sign that judicial decentralization does not essentially consist in the residence of the judges at the *chef lieu* of their districts.

Mr. Tellier—In Joliette and in Richelieu, as a matter of fact, the judge does not remain in the district, though the law obliges him to reside there.

Hon. Mr. Casgrain—I am glad to hear the remark of my learned friend from Joliette, but I will ask him if he is able to imagine a law which will force the judge to reside effectively in a district. Can he imagine a law with which the judge will comply? It is well known that in the case of certain judges—I do not speak of those existing to-day, I speak of those who have disappeared from the scene—an attempt was made to compel them to remain in their district. Well, what happened? They rented a house in the district in which they should reside, and put their name on the door, but they lived for the greater part of the year either at Quebec or Montreal. The law, as it at present stands, obliges the judge to reside in his district; but ever since it has been in our statutes it has been a dead letter and incapable of being applied in practice. Those who have preceded us have tried to apply this law, but they never succeeded, and I don't think that any one ever will succeed in doing so, because it is one of those laws which, although they may be written in the statutes, no one can ever expect to see observed.

A Member—"Then it will only amount to the same thing."

Hon. Mr. Casgrain—It will not amount to the same thing with my law, and for this reason: That the judges of the Superior Court in rural districts tell us to-day: "We have not much work in our districts, while there is much work in Montreal, and, besides we usually come from the great cities, from Montreal or from Quebec." As a matter of fact, it is true that for one reason or another the judges of the Superior Court have been chosen from Montreal and Quebec. But I take this ground. Judges of the District Court receiving a salary of \$3,000, being named specially for rural districts, and being chosen generally from among the members of the bar of rural districts, would have every interest in remaining in their districts, because their salaries would not be large enough to allow them to live at Quebec or Montreal, and in addition to this their tastes and their habits will cause them to live in the centre to which they have been ap-

pointed. There will no longer exist the pretext which to-day permits those who do not wish to remain in their districts to go to sit at Montreal or at Quebec. The pretext that the Superior Courts are encumbered will vanish, because I pretend that after the adoption of this bill there will no longer be any encumbrance either at Quebec or at Montreal, neither before the Superior Court nor before the Court of Appeals, and thus there will be no longer this pretext for country judges to go to Quebec or Montreal to sit. I know that to-day it is not only a pretext, but a weighty reason, and one cannot attack these judges because five or six of them sit at Montreal when they should reside in their district. They are called there by the Chief Justice, and they are almost obliged to go; they must go for the despatch of business. This reason, then, will no longer exist. You will have in each district what you cannot have at present, that is to say, a resident judge who will judge all cases brought before him.

*Complaints against the Present System.*

It is also said, Mr. Speaker, that there is no complaint against the present system, that no one complains of it, and that no one asks a change in it. I have heard this reasoning used by men who were certainly capable of criticizing the bill, who by their legal knowledge could study it with advantage, and who by the suggestions they made might improve it; but I must say that I cannot understand how this assertion could be made. Since I have been in the house (since 1886) I have always heard complaints against the administration of justice as at present carried on, especially in the district of Montreal. I have always heard it said that the present system, however well it might have served in 1857, did not now meet the wants of the people or of those having business before the courts. I have always heard this said. The law has been amended almost every session. Law upon law has been introduced into the statutes to improve the position complained of. To-day there are still complaints. There are newspapers in Montreal which are not favorable to the bill, and which said at the beginning of the session, that there were complaints, and serious ones, against the administration of justice. Some said that it was the fault of the Code of Civil Procedure; others that it was the fault of the judges. They may or may not be right, but I say that there are excellent judges at Montreal and at Quebec. There are perhaps some who are not what they should be. Take, for example, the ten judges of Montreal. I say that they are a good average and what men in general are, and I say that if you take ten men, I don't care from where, you will not find a better average than that of the ten judges of Montreal. I believe that certain judges do not do all the work they might do. I do not know this personally, myself; I am only repeating what is usually said. Nevertheless, I profess the greatest respect for the judges of Montreal, and I believe that whatever any one may say, no ten other men would do more work than the ten judges of Montreal. The judges are men, and men are always men, whatever may be the bills we may introduce and have adopted by this House.

As to the Civil Procedure, the bill, as I have said, is already distributed. We will try to remedy, as far as possible, the abuses which actually exist. But with the best code of civil procedure in the world you could not cause the disappearance of the trouble that exists at Montreal, namely, the obstruction of the courts. There are not enough judges at Montreal, while in other parts of the province there are far too many. Now, some one may say: "You have no right to legislate only for the city of Montreal. You must not take into consideration only the wants of the great metropolis of Canada, whatever its importance." To a certain point I differ from those who think thus. I do not mean to say that the legislation of this country should be subordinated to the interests of Montreal, but I do say that Montreal, from a financial standpoint, from a commercial standpoint, from the point of view of the population, and from the point of view of the judicial business of the country, has a right to all the solicitude of the Legislature. Now, sir, above all, from the point of view of the administration of justice, I say that we are obliged, if not to subordinate the administration of justice of all the province to that of the city of Montreal, at least to give to the city of Montreal the part which she deserves by the important position which she occupies in judicial annals. I will give the House some figures which will show to what a degree our solicitude for the city of Montreal in this important affair should actuate us.

*Concentration of Business in Montreal.*

Here are statistics for the past ten years, made, not by persons under the control of the Government, but by officers who are absolutely free to do their duty, and who are obliged to do it. During the last ten years there were issued from the Superior Court for the whole of the Province of Quebec 52,331 writs. Thus in all the Province of Quebec there were issued from the Superior Court 52,331 writs. Now how many do you think out of this number were issued from the Superior Court of Montreal? I was surprised and astonished at the number of writs issued from the Superior Court of Montreal, and this inclines me more than ever to say that I should come to the aid of the city which suffers the most from the existing state of affairs. The number of writs issued from the Superior Court of Montreal was 29,280. That is to say, that more than half the writs of all the Province of Quebec were issued from the Superior Court of Montreal. Now, let us take the judgments in contested cases. The Superior Court judgments in contested cases for the Province of Quebec amount to 16,220. Now for the city of Montreal alone, in the district of Montreal, out of this total number of 16,220 judgments there are 7,708. That is to say, again, the half of the judgments rendered in the Province of Quebec in contested cases. Now it is easily seen that if in certain districts the judges have hardly one, two or three months' work to do a year, the judges of Montreal district are so over-crowded with work that they cannot do it all and are obliged to call to their assistance the judges of the surrounding country districts, and even to call the judges of country districts lower down in the river than Quebec, and the

obstruction is such in the Court of Appeals at Montreal, that, as I said a moment ago, if you to-day inscribe a case at the Court of Appeals at Montreal you would be obliged to wait two years before being able to plead it. I say that this state of things cannot continue to exist. If you inscribe a case at Enquête and Merits at Montreal to-day,—by this procedure which ought to give you judgment as quickly as possible—you are obliged, if our information is correct, to wait nine months before you can have your case heard.

I ask you, can we tolerate such a system in this advanced age? Is this the despatch which litigation must expect in our Province of Quebec? I ask myself if we are not much more behind the times than all the countries surrounding us, and the European countries too on this question? I say that these abuses and this obstruction which exist in Montreal cannot continue, and, as long as I am Attorney-General, in view of the importance of the city of Montreal, I will work with all my might to make our judicial system the equal of others, the equal of the system of the surrounding countries. Now, sir, I declare that for twenty years there have been complaints of the system which at present exists in this province, and not only in Montreal but all over the province. I repeat that at least in a dozen districts there are judges who have not more than three months' work a year, while in the districts of Montreal, Quebec and Sherbrooke, the judges have more to do than they can accomplish. This is still another thing which must not continue to exist. This inequality in the distribution of work is an anomaly which whoever is solicitous for the best administration of justice in this country cannot permit to continue.

In 1880, Judge Pagnuelo, who was not then a judge, who, consequently had not then the interest in the matter that might be attributed to him to-day, in common with the other judges, wrote in letters which have remained famous, that for ten years past the existing system had been complained of, and he proposed another system, he proposed a reform in the judicial administration of the country. Then in 1880, the evil had already existed for ten years and he demanded a remedy. In 1880 the Bar of Montreal itself passed a resolution asking the two Governments, those of Ottawa and Quebec, to modify the present system, because it did not give satisfaction. A committee was formed to meet the members of the local and Federal Governments, but for some reason or other, the Governments did not agree, and the proposition fell to the ground. In 1882, Mr. Larue, whom we all knew, wrote some letters in the same sense. In 1888 a commission consisting of Mr. Justice Jetté, and Messrs. Lorrain and Weir said what follows in their report to the Prime Minister and the Attorney-General, and I would draw the special attention of the honorable members to this report, which is very well drawn up. It will be seen at the 22nd page of this report that the commissioners insist on judicial reorganization, and I quote it in reply to those who said that no complaints had been made and that no reform had been demanded, and for the benefit of those who say that all was running smoothly and that no one is complaining of the existing system; I quote it in order to

prevent my passing as an innovator who wishes to reform everything for the pleasure of reforming, and in order to prove that I am sustained by authorities, who are authorities both for myself and for the House.

This is what the report of Hon. Mr. Justice Jetté and Messrs. Lorrain and Weir says at page 22 :—

“It will be said, perhaps, that judicial organization has no connection with procedure. The contrary is the case. Even if the procedure were excellent ; if the organization which should put it into execution is defective, the evil will still exist, or rather the remedy will be inefficacious.

“‘Good administration,’ says Mr. Bertrand, councillor in the Court of Appeals, of Paris, ‘depends in a great measure upon the organization of judicial bodies.’

“With most nations this organization is different. With all there are complaints of imperfections and abuses. All demand reforms.

“The problem to be solved is to find an organization which while respecting the rules of justice and equity can dispose of the greatest amount of business in the simplest, most expeditious, most efficient and least costly manner for all concerned.

“This reorganization, then, is in the front rank of the reforms to be introduced.”

Here, then is a report which emanates neither from the Government nor from myself, but from a body of distinguished men completely independent of the Government, and which says : ‘This reorganization, then, is in the front rank of the reforms to be introduced.’ Already the late Mr. Justice T. J. J. Loranger, in the report presented in 1882 by the first commission appointed for the consolidation of the Code of Procedure, insisted upon this capital point. Mr. Pagnnello, in his excellent work entitled : “Letters on Judicial Reform,” published in 1880, had also pointed out this reorganization as necessary. Hon. Mr. Laflamme and Mr. Edmond Larue, in brochures published in 1882, equally mention it as the compeer with reform in the Code of Procedure. There is no doubt that of all the reforms which we may attempt, these, wisely combined, would produce the most considerable results.

I cannot better terminate these remarks than in supporting myself upon the authority of an eminent man who has recently been taken from us. I mean the Hon. Mr. Rodolphe Laflamme, who in 1882 wrote on the question of judicial reform. The opinion of Mr. Laflamme is one that everybody respects. As a lawyer he was at the head of his profession. I had lately charged him to represent in England the interests of the Province of Quebec in a case of the highest importance, which he pleaded with so much ability, so much science, so much zeal, that Sir Horace Davey, one of the most distinguished members of the English Bar, paid me the compliment of thanking me for having sent Hon. Mr. Laflamme to give him the assistance of his legal talents. To-day, the eminent lawyer, the frank friend, so loyal and large-hearted, the former Minister of Justice and Attorney-General of the Dominion, has disappeared, and I profit by the occasion of so important a question as that which I am now discussing, and which he had so well studied, to render to his talents, to his merits, and, above all, to the act of courage and of faith which illuminated his death, a public and solemn testimony.

## GENERAL NOTES.

LORD BACON ON REPORTING.—The following occurs in Lord Bacon's "Advancement of Learning" (Book VIII., ch. 3, ss. 73-75):—"Above all, let the judgments of the supreme and principal courts be diligently and faithfully recorded, especially in weighty causes, and particularly such as are doubtful, or attended with difficulty or novelty. For judgments are the anchors of the laws, as laws are the anchors of the state. And let this be the method of taking them down:—1. Write the case precisely, and the judgments exactly, at length. 2. Add the reasons alleged by the judges for their judgment. 3. Mix not the authority of cases, brought by way of example, with the principal case. 4. And for the pleadings, unless they contain anything very extraordinary, omit them. Let those who take down these judgments be of the most learned counsel in the law, and have a liberal stipend allowed them by the public. But let not the judges meddle in these reports, lest favouring their own opinions too much, or relying upon their own authority, they exceed the bounds of a recorder."—*Irish Law Times*.

BANK OF ENGLAND NOTES.—With the Bank of England, the destruction of its notes takes place about once a week, and at seven p m. It used to be done in the daytime, but made such a smell that the neighboring stockbrokers petitioned the governors to do it in the evening. The notes are previously cancelled by punching a hole through the amount (in figures) and tearing off the signature of the chief cashier. The notes are burned in a closed furnace, and the only agency employed is shavings and bundles of wood. They used to be burned in a cage, the result of which was that once a week the city was darkened with burned fragments of notes. For future purposes of reference, the notes are left for five years before being burned. The number of notes coming into the Bank of England every day is about 50,000, and 350,000 are destroyed every week, or something like 18,000,000 every year. The stock of paid notes for five years is about 77,745,000 in number, and they fill 13,400 boxes, which, if placed side by side, would reach two and one-third miles. If the notes were placed in a pile, they would reach to a height of five and two-thirds miles; or, if joined end to end, would form a ribbon 12,455 miles long.—*Chambers' Journal*.

# THE LEGAL NEWS.

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VOL. XVII.

FEBRUARY 1, 1894.

No. 3.

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## *CURRENT TOPICS AND CASES.*

The appeal list at Montreal, after showing a steady increase for several years, dropped last month to 99 cases, —only ten new cases having been put on the roll since the November term. In January, 1891, the number of inscriptions on the printed list was 86; in January, 1892, it was 118; in January, 1893, it was 138. The January list of 1894 brings it nearly back to what it was in 1891. A peculiarity of the last list was that out of 99 cases, only 19 were indicated as ready for hearing. In 80 cases the factums were not filed, and, under the rules of the court, these cases could not be called for hearing, with the exception of two or three in which the factum on one side only was lacking.

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The consequences of this state of the list were very soon apparent. On the third day of the term the seventeenth case on the list was reached, and from that day forward cases were called in any order in which counsel could be induced to argue them. There being no privileged cases, and no very long case to impede progress and afford the other members of the bar a chance to get their factums ready, the Court, on the ninth day of the term, was hearing cases which stood near the end of the printed

list. On the forenoon of the tenth day judgments in cases standing over were rendered, and the court adjourned two days before the regular closing day. The list was cleared of about forty cases in all, including those settled and discontinued. Unless unusual activity is shown in the institution of appeals during the next six weeks, the March list will not much exceed 70 cases, which will nearly all be disposed of before the long vacation, leaving the September list entirely unincumbered by appeals of the year 1893.

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The trial of Hooper for murder ended, as was generally anticipated, in a verdict of "not guilty." No trace of poison was detected by the expert intrusted with the analysis of the contents of the stomach of the supposed victim, and, owing to some unfortunate blundering in the *post mortem* examination, the actual cause of death was left in doubt; for it was admitted by the Crown that the symptoms, while agreeing with those of poisoning by prussic acid, were not inconsistent with the theory of death from fatty degeneration of the heart, and the *post mortem* examination was not minute enough to negative this hypothesis. The jury, therefore, could not do otherwise than render a verdict of acquittal. It is evident that greater care must be taken in the future in the examination of bodies, where foul play is suspected. It is possible, as far as can be judged at present, that a proper *post mortem* examination in this case might have saved the Crown the necessity of a costly investigation and useless trial.

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In *Molson & Barnard*, Montreal, January 25th, 1894, the Court of Appeal maintained the doctrine of the immunity of a witness, for statements made under examination, unless gross malice has been apparent in the witness' deposition. This goes somewhat further than the recent

decision of the Court of Review at Montreal, in *Hibbard v. Cullen*, where the Court seemed inclined to hold the witness to a stricter responsibility for his answers under examination. The view taken of the question by the Court of Appeal differs little from the opinion expressed by Mr. Justice Davidson in giving the original judgment in *Hibbard v. Cullen*, R. J. Q., 3 C. S. 463. Mr. Justice Davidson said: "A witness is punishable for perjury, but may not be assailed by civil writs." In *Molson & Barnard* the Court of Appeal reversed that portion of the judgment of the Court below, which condemned Mr. Molson in damages for offensive statements made by him in his deposition with reference to Mr. Barnard.

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The Monson trial, in Scotland, in one respect resembled that of Hooper in Canada: the evidence for the Crown left some doubt whether a crime had been committed. In the Monson case the Scotch verdict of "not proven" was found. Does this admit of his re-arrest and re-trial for murder? The London *Law Journal* says:—"In spite of the curious silence of the law of Scotland upon the point, there would appear to be little doubt that Monson has 'tholed his assize,' and that he is now, in the quaint language of Caledonian law, 'forever free from all process or question' touching the alleged murder, or attempted murder, of Lieutenant Hambrough.

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The Court of Appeal at Montreal, (January 25th, 1894), in confirming, by three to two, the decision of Tait, J., in *Pullman Car Co. & Sise*, R. J. Q., 1 C. S. 1, did not consider it necessary to decide whether companies supplying accommodation to the public by means of sleeping cars attached to railway trains, occupy the same position as hotel-keepers, as regards responsibility for occupants' luggage. The majority of the court held that the

company were responsible by reason of the gross negligence proved against them, while the minority differed on the question of fact. It would have been more satisfactory to have a decision on the question of law, but when that comes to be decided it may be found that it does not give rise to very serious difficulty.

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The serious illness of Sir Francis Johnson during the past month has been the cause of much anxiety to his friends. The learned Chief Justice of the Superior Court last year suffered during several months from a severe attack of influenza, and this second illness ensuing before he had regained his usual strength, has reduced him to a condition of extreme weakness, which is not without danger in view of his advanced age.

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#### *NEW PUBLICATION.*

THE CRIMINAL CODE OF CANADA, and the Canada Evidence Act, 1893, with an extra appendix containing the Extradition Act, etc., by James Crankshaw, Esq., B.C.L., Advocate etc, Montreal: Whiteford & Theoret, Publishers, 1894.

This work, the publication of which was briefly noticed in our last issue, is designed to give a complete general view of our criminal law and procedure, and is intended for the everyday use of judges, magistrates, advocates and others concerned in the administration of justice. The author states in his preface that to this end, in the preparation of the notes and comments, appropriate references have been made to, and extracts taken from the leading English, Canadian and American authors and reports, as well as from Imperial and Canadian statutes, and the English Draft Criminal Code with the report of the Royal Commissioners thereon. Forms of indictment,

etc., are placed at the end of the titles to which they appertain. Among other matter given in the appendix may be found the debates on the Criminal Code in the House of Commons, in 1892.

This work, though in part anticipated by that recently noticed, from the pen of Mr. Justice Taschereau, contains features which merit the favorable consideration of the bar. The authorities cited, and the illustrations given cannot fail to be of great assistance in the elucidation of the text. The labor involved in the preparation of a book of nearly one thousand pages will be adequately appreciated by few. That it has been successfully executed the work before us bears testimony. The arrangement, it may be observed, is careful and methodical, and the typography clear and satisfactory. Mr. Crankshaw must be congratulated upon his successful achievement.

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*GARANTIE DE FOURNIR ET DE FAIRE VALOIR—  
RECOURSE OF TRANSFEREE.*

The following notes were prepared by Mr. Justice Loranger in the case of *Boisvert v. Augé*, in Review, Feb. 13, 1892, reported in R. J. Q., 2 C. S. 177:—

LORANGER, J.:—Il s'agit de savoir quelle est l'étendue de la garantie du cédant sous la clause de fournir et faire valoir.

L'obligation transportée est du 15 octobre 1872. pour \$600 payable avec intérêt à 8 p. c. par installéments annuels de \$100 à commencer le 18 octobre 1873. Le transport est du 9 janvier 1893, dix mois avant l'échéance du premier paiement; il a été fait par le défendeur créancier du nommé Isidore Augé, débiteur de la dite obligation, au nommé John L. Clarke. Ce dernier étant décédé, sa légataire universelle a transporté la créance au demandeur actuel. Ce dernier transport est du 21 mars 1882, quatre ans après l'échéance du dernier paiement. Le débiteur a été régulièrement saisi des deux transports. Il a payé du vivant de Clarke une somme de \$400 en différents paiements à partir du 13 février 1874 à aller au 22 novembre 1878.

Le demandeur n'a réclamé en justice le montant qui lui était dû, que le 28 février 1883, et son jugement est du 11 février 1884.

Le 16 juin 1884 la banque St-Hyacinthe a fait vendre sur le défendeur l'immeuble sujet à l'hypothèque donnée comme sûreté de la créance transportée, et le demandeur n'a été colloqué que pour une partie des frais qu'il avait encourus sur son action contre le débiteur Isidore Augé. Il avait lui-même discuté les meubles dans le mois de mars précédent et il y a eu carence. Le demandeur a essayé une seconde fois en décembre 1886 de faire exécuter son jugement, et il y a eu également retour de *nulla bona*. Il s'adresse maintenant au défendeur le cédant, et alléguant l'insolvabilité du débiteur, il réclame le montant dû sur le transport et les frais encourus sur la discussion des biens du dit Isidore Augé. Le montant total est de \$908.69.

Le défendeur plaide que le débiteur, Isidore Augé, était solvable lors du transport à Clarke et aux échéances mentionnées dans l'obligation ; que le demandeur et son auteur ont perdu par leur négligence et incurie, l'occasion de se faire payer en temps convenable, et qu'il se trouve en conséquence déchargé.

La cour en première instance a jugé que la garantie du cédant ne s'étend pas au-delà de l'époque convenue pour l'exigibilité de la dette, mais comme matière de fait, a trouvé que le débiteur, Isidore Augé, était insolvable à chacune des échéances de l'obligation transportée, et elle a condamné le défendeur. Nous partageons l'opinion de l'hon. juge de première instance et croyons que la garantie du cédant ne s'étend pas au-delà de l'exigibilité de la dette. C'est une erreur de l'assimiler à la caution, et les articles de notre code qui concernent la caution n'ont pas leur application au cas actuel. La différence est en effet importante. Dans le cas de cautionnement, le créancier peut toujours s'adresser directement à la cour et il n'est tenu à la discussion que lorsqu'il est mis en demeure de le faire, et quand on lui a offert les frais nécessaires à la discussion du débiteur ; tandis qu'au contraire le cessionnaire, qui est le maître absolu de la créance cédée, le seul porteur du titre, est obligé de voir à sa conservation. C'est à lui qu'incombe le devoir de protéger la créance, et s'il ne le fait pas et qu'elle devienne perdue par son propre fait, la perte est pour lui.

Telle est la doctrine enseignée par Loyseau, sous l'ancien droit et reconnue par la majorité des auteurs modernes, entr'autres M. Troplong, nos 939 et suivants, de son traité de vente.

Etant admis que le défendeur n'a garanti la solvabilité du débiteur, Isidore Augé, que jusqu'à l'échéance des paiements, il reste à savoir si à ces différentes époques Isidore Augé était solvable et si le cessionnaire a fait les diligences nécessaires en temps utile. C'est là une matière de fait sur laquelle un certain nombre de témoins ont été entendus contradictoirement.

La cour de première instance a jugé que l'insolvabilité d'Isidore Augé avait été prouvée aux différentes époques des paiements.

Nous trouvons que la cour a erré dans l'appréciation des faits : Isidore Augé possédait l'immeuble qu'il a hypothéqué comme garantie du paiement de l'obligation transportée. Cet immeuble valait suffisamment pour protéger la créance, puisque le créancier s'est déclaré satisfait de la garantie qu'il recevait. Il est prouvé en outre qu'il tenait un magasin ; qu'il avait le roulant nécessaire pour les fins de son commerce, et qu'il exploitait un moulin à scie,—sans être riche il jouissait d'assez de crédit pour faire face à ses affaires. Il me paraît résulter de la preuve que si à l'échéance de chacun des paiements, c'est-à-dire le 18 octobre 1873 et les années suivantes, on avait exigé les \$108 qui étaient dues, au lieu de laisser arranger les échéances, le cessionnaire aurait pu se faire payer :

Comme matière de fait, il a payé \$400 sur le capital de \$600, et les intérêts échus depuis 1872 jusqu'à 1878, date du dernier paiement.

Il est en preuve que le demandeur lui-même a fait des affaires avec Isidore Augé après l'échéance de la dite obligation ; il lui a avancé du bois et d'autres effets pour son moulin, pour un montant s'élevant à \$162. Ces avances ont été faites en février et mars 1882 ; la dernière est du 10 mars et le transport de la créance au demandeur est du 21 du même mois. Aussi, lorsque le demandeur s'est porté acquéreur de la créance il reconnaissait qu'Isidore Augé était solvable puisqu'il faisait des affaires avec lui à crédit. Pourquoi ne l'a-t-il pas fait payer dans le temps ? Pourquoi n'a-t-il attendu jusqu'au mois de février de l'année suivante pour prendre son action ? La preuve nous le dit, c'est que dans l'intervalle le moulin que le demandeur exploitait a été incendié ; ce qui, naturellement, a porté le désordre dans ses affaires. C'est alors seulement que le demandeur s'est décidé à faire valoir sa créance en justice. Il était malheureusement trop tard ; Isidore Augé était devenu insolvable et toutes les diligences que le demandeur a pu faire n'ont produit que des frais qu'il voudrait maintenant faire payer au cédant.

Nous croyons que, sous les circonstances, le cédant est relevé de son obligation et qu'il y aurait injustice à le contraindre à payer une créance perdue par la faute et la négligence du cessionnaire.

Le jugement est en conséquence infirmé avec dépens de la cour de première instance et de cette cour.

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### EXCHEQUER COURT OF CANADA.

OTTAWA, January 9, 1894.

*Coram* BURBIDGE, J.

THE QUEEN V. PERMELIE LA FORCE.

Ottawa.]

*Scire Facias to repeal a Canadian patent—Prior foreign invention unknown to Canadian inventor.*

The pneumatic tire as applied to bicycles came into use in 1890. It consisted of an inflatable rubber tube with an outer covering or sheath, which was cemented to the under surface of a U-shaped rim similar to that which had been used for the solid and cushion rubber tires which preceded it. This tube was liable, in use, to be punctured, and as the sheath was cemented to the rim of the wheel, it was not readily removable for the purpose of being repaired. La Force's invention met that difficulty by providing for the use of a rim with the edges turned inward so as to form on each side a lip or flange, and of an outer covering or sheath, to the edges of which were attached strips made of rubber or other suitable material, which fitted under such lips or flanges and filled up the recess between them. When the rubber tube is not inflated, this tire may readily be attached to or removed from the rim of the wheel, but when inflated the covering or sheath is expanded and the outer edges of the strips attached thereto are forced under the flanges of the rim, and the whole securely held in position by the pressure of the inflated tube upon such strips.

The defendant's assignor hit upon this idea in April, 1891, and in company with his brother made a section of a rim and tire on this principle in May following. On the 3rd of August, in the same year, he applied for a patent therefor in Canada, and on the 2nd December following obtained it. In March, 1891, Jeffery, at Chicago, in the United States, conceived substantially

the same device, and confidentially communicated the nature thereof to his partner and patent solicitor. On the 27th of July, he applied for a United States patent, and on the 12th day of January, 1892, such patent was granted to him. On the 5th of February, 1892, he applied for a Canadian patent, which was granted to him on the 1st of June, in the same year.

When, in May, 1891, LaForce's conception of the invention was well defined there had been no use of the invention anywhere, and the public had not anywhere any knowledge or means of knowledge thereof.

*Held*, that the fact that prior to the invention of anything by an independent Canadian inventor, to whom a patent therefor is subsequently granted in Canada, a foreign inventor had conceived the same thing, but had not used it or in any way disclosed it to the public, is not sufficient, under the Patent laws of Canada, to defeat the Canadian patent.

*Baxter v. Howland*, 26 Grant, 135; and *Smith v. Goldie*, 9 Can. S. C. R. 46, followed.

2. That the drawings annexed to a patent may be looked at by the Court to explain or illustrate the specification. *Smith v. Ball*, U. C. Q. B. 122, followed.

*W. Cassils, Q.C.*, and *Gormully, Q.C.*, for relators.

*Ritchie, Q.C.*, and *Ross*, for respondents.

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### LIBELS BY LIBRARIANS.

*Martin v. The Trustees of the British Museum* raises a question of great public interest—viz. whether the preservation, in a public department, of a book containing defamatory statements is equivalent to the publication of a libel, and whether such publication is privileged. We have not the slightest intention of discussing the particular books said in this case to contain defamatory matter, and shall confine ourselves to considering the results of a decision adverse to the Museum.

By law, all publishers of books must send a copy to the Museum. They are under no legal obligation to publish libels; but if they do so they are sending a copy to the Museum in pursuance of a public duty. But the liability of the Museum, if any, must rest on other considerations—viz. on cataloguing and rendering available to readers the books sent to them. The Museum, and to

some extent free public libraries, stand in a different position from Mudie's and Smith & Son's, and other libraries conducted for profit. Whether the Museum is privileged absolutely, or by the occasion, must depend on whether under the charters and statutes constituting the Museum they are bound to give facilities for reading, and to publish to that extent the books sent to them. A possible distinction may be taken between British and foreign works, inasmuch as the Copyright Acts, apart from conventions, do not apply to the latter; but here also the answer to the question must be sought in the statutes and charters. If it is decided that the Museum is not absolutely privileged, we shall be in this curious position: that any person who has been defamed in any book will be able to insure the destruction of all record of the defamation, even in the National Library, and, moreover, the authorities may at any moment be indicted for obscene libel in respect of the undeniably numerous works on their shelves which are unsuitable for general reading. The reasons for stopping general circulation of a libel are obvious; but they are inapplicable to a national repository of all published books, and, if they had been applied in the past, many manuscripts and documents which have been of the greatest value to historians would have been ruthlessly destroyed. If, therefore, the ultimate result of the litigation now pending is unfavourable to the Museum, as on the general principles of the law of libel and the particular decision of the Divisional Court seems possible, legislation will undoubtedly be necessary to protect the National Library, and such legislation will not really prejudice any living person.—*Law Journal* (London).

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#### RIPARIAN RIGHTS.

A point of some interest and novelty on the subject of riparian rights was considered in the Scotch appeal case of *Young v. The Banker Distillery Company*, L. R. (1893) App. Cas. 691. Some sixty years ago the company, the respondents to the appeal, established a distillery on the banks of the Doups Burn, in the county of Stirling, attracted apparently by the soft character of the water. The appellants, the lessees of certain mines, had taken to pumping water from these mines into the Doups Burn at a point above the distillery. The water so added to the stream, which would not otherwise have flowed into it, was perfectly

pure, but hard in quality, and rendered the water of the stream less suitable for distilling purposes. The House of Lords, affirming the Court of Session, held that the appellants had no right to introduce what they described as "foreign" water into the stream with this result; but a point of much wider interest was discussed—that is to say, whether a riparian proprietor when he uses the water of the stream itself for what are called "secondary purposes," such as the manufacture of some particular produce, and afterwards restores it to the stream, has a right to restore it in an altered chemical condition so long as it is pure and fit for ordinary purposes. On this point the Court of Session thought that the upper riparian owner might alter the character of the water so long as he returned it fit for the ordinary purposes of a running stream. The House of Lords distinctly dissented from this view, and though it was unnecessary to decide the point, laid down in terms which will probably now be taken to be law both in England and Scotland, that the lower riparian proprietor is entitled to have the natural water of the stream transmitted to him not only in a pure state for drinking and other ordinary purposes, but without sensible alteration in its character or quality.—*Ib.*

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### *BARRISTERS IN THE JURY-BOX.*

The refusal of Mr. Baron Pollock to exempt a barrister from serving on a jury at Guildhall will probably occasion surprise to most readers of the report, for, although it is common knowledge that solicitors can only claim exemption so long as they continue to practise and to take out their annual certificates, yet it is currently believed that all members of the Bar are—as all clergymen are—relieved from the duty of serving as jurors. This belief is, however, erroneous, for the Jurors Act of 1870, like the earlier Act which it replaced, extends the privilege of exemption only to serjeants, barristers at-law, and certificated conveyancers if actually practising. The limitation, therefore, is clear enough, but the application of it suggested by the learned judge, according to the account of the incident in the daily papers, seems open to question. He is stated to have refused to release the juror because the latter had not, in fact, practised for six months. Being prepared to practise is not practising, he said, for he might just as well call himself an admiral of the fleet because he

would be ready to take command. With great deference to the learned judge, the cases are not the same. There are, of course, a large number of gentlemen who are called to the Bar but never prepare themselves for professional work or hold themselves out as candidates for briefs, and these are, no doubt, excluded from the privileges of practising barristers. But to enter upon an inquiry whether a barrister whose name appears in the Law List and upon chambers in an Inn of Court as practising at the Bar has succeeded in getting work, or when his last brief was delivered, would be a highly inconvenient course. And it would be melancholy indeed if, when a client at length arrived to retain the services of one who had long waited on fortune in vain, the counsel sought for were to be found locked up in the jurors' room, or actually engaged in trying the part-heard case in which his assistance was required.

We have always understood, too, that the privilege extended to members of the Bar rested partly upon a belief that their training unfitted them to discharge the useful but uncritical functions of the judge's lay assessors. The introduction into the jury-box of jurors who are educated and prepared to practise as advocates is certainly calculated to lead to the delivery to their co-jurors of supplementary and, perhaps, conflicting summings-up which would not, we fear, ease the wheels of the car of justice.—*Ib.*

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#### CHANCERY DIVISION.

LONDON, Jan. 22, 1894.

Before ROMER, J.

THORNELOE v. HILL, (29 Law J. 63.)

*Trade Name—Right to Use—Right in Gross—Assignment.*

The plaintiff claimed the exclusive right to mark and sell watches with the name 'John Forrest.' In 1871 one John Forrest, who had carried on in London in his own name the business of a watchmaker, marking his watches 'John Forrest, London,' died, and his administratrix sold his business and goodwill to Carley & Co. Carley & Co. did not continue Forrest's business, but from 1871 to 1874 they placed the name 'John Forrest' on some of their watches. In 1874 they granted an exclusive license

to another firm in Liverpool for seven years to use the name for watches. After the expiration of the license they used the name on their own watches, but only to a very limited extent. In 1890 Carley & Co. assigned their assets to a trustee for creditors, who sold to one Clemence their business and goodwill, and purported to assign to the plaintiff for 20*l.* 'the name, title and goodwill of John Forrest.' The plaintiff carried on business at Coventry, and never in London or under the style 'John Forrest,' but he had used that name since his assignment by placing it on some of his watches.

*Sir R. Webster, Q.C., and Sebastian* for the plaintiff.

*Moulton, Q.C., and Willis Bund* for the defendant.

ROMER, J., held that, assuming Carley & Co. had ever any right to mark their watches with the name 'John Forrest,' they had lost it during the period of the license, and possessed no title to the goodwill of the business originally carried on under that name. No right passed under the assignment to the plaintiff, and the action could not be maintained.

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### QUEEN'S BENCH DIVISION.

LONDON, Jan. 23, 1894.

MARTIN AND WIFE v. THE TRUSTEES OF THE BRITISH MUSEUM  
AND ANOTHER, (29 Law J. 64).

*Libel—Interrogatories—Privilege—Onus probandi—Questions  
Directed to Show Malice.*

This was an appeal from an order of Bruce, J., in chambers, allowing certain interrogatories. The action was brought against the defendants for publishing a libel on the female plaintiff by allowing books containing a libel to be read by visitors to the British Museum. By their statement of defence the defendants denied publication, and also set up that they had placed the books in the library by virtue of powers conferred upon them by 26 Geo. II. c. 22. They further set up that by the statute the trustees had power to make rules for the inspection of the books contained in the library, and that in this case they had exercised due care and had acted without malice. The plaintiff then administered interrogatories to the defendants, containing ques-

tions (*inter alia*) asking when and how the defendants came into possession of the book, and what care they had taken to ascertain its contents. The defendants objected to answer; but on summons the judge in chambers ordered them to answer.

The defendants appealed.

*The Attorney-General*, (Sir Charles Russell, Q.C.) and *Sutton*, for the appellants: The interrogatories objected to ought not to be allowed; at the most they are only relevant as to damages (*Ridgeway v. Smith*, 6 Times Rep. 275).

*Sir R. Webster*, Q.C., and *R. M. Bray*, for the respondents: The defendants plead non-publication and privilege. The latter defence throws the onus on the plaintiff to prove malice; and these questions are directed to facts showing malice. *Ridgeway v. Smith* only applies where the defence is a denial of publication.

*Sutton*, in reply, cited *Parnell v. Walters*, 56 Law J. Rep. Q. B. 125, and *Henessey v. Wright*, 57 Law J. Rep. Q. B. 530.

The COURT (MATHEWS, J., and COLLINS, J.) held that there were two lines of defence. The second line was that the defendants received the books under a statutory right. It was then part of the plaintiff's case to prove negligence, and he was entitled to question the defendants on facts showing negligence.

Appeal dismissed.

### A FAMOUS SOLICITOR.

Sir George Lewis has passed through the ordeal of an examination at the hands of an "interviewer," and the result is an illustrated article in the *Strand Magazine*, in which some interesting expressions of opinion are recorded. He thinks that it is much to be regretted that at an inquest the advocate is not allowed to make a speech to the jury. "Had I been able to do so," said Sir George, referring to the Balham mystery, "I could and should at once have relieved both Dr. Gully and Mrs. Bravo from any suggestion that they in any way participated in the crime. You are at liberty to say—and I am publicly expressing this for the first time—that I then and still do believe them not guilty." He first briefed Sir Charles Russell on behalf of Mr. Labouchere in a newspaper libel case, and he regards him as "the greatest advocate" of his time. "I knew both Sergeant Ballantyne and Sergeant Parry when in their best days practising at the Old Bailey. Ballantyne was famous for his power of cross-

examination and Parry for his advocacy, but I question if they would be successful to-day." Speaking of Mr. Labouchere, whom he called the "Napoleon of litigants," he remarked, "No litigant has been more successful than he, except that he has been left to pay some £20,000 in costs."

It is not uninteresting to learn how Sir George Lewis, who was born in one of the rooms in Ely Place now used as an office, made his first appearance as a Police Court advocate. It occurred during the absence of his father and when he was about nineteen. A woman rushed into the office in a terrible state of anxiety, and stated that her son was in custody at the Westminster Police Court on the charge of robbing the till of a public-house. The young practitioner rushed away in a cab and fought the case and won. "Whilst I was questioning the witnesses I didn't know whether I was on my head or my heels. The mother was a very big, muscular woman, and waited for me outside. I was made very happy by the words which accompanied her little-too-enthusiastic smack on the back: "Well done, young'un!" But the enthusiasm hurt. Of the many *causes célèbres* in which Sir George Lewis has been engaged, he regards the Parnell Commission as the greatest. He discovered that the famous letters were forgeries soon after the documents were submitted to him. "During the first six months of the inquiry I had to sit with the secret that I knew *who* was guilty, and unable to tell a soul. When Piggott—and a greater scoundrel I never met—was put in the box I soon relieved myself of it." What the distinguished solicitor remembers best about the Baccarat case is the last words of Lord Coleridge's summing-up: "Gentlemen, in considering the honor of Sir William Gordon-Cumming, do not forget your own." Sir George Lewis has not kept a diary for twenty years. The affairs of his clients were of too confidential a nature to admit of any record. At one time he thought that this departure from the general rule of solicitors would lead to some severe observations from the Bench; but a Lord Justice told him that no judge, under such peculiar circumstances, would ever blame him.—*Law Journal (London)*.

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#### GENERAL NOTES.

THE SUPREME COURT OF PENNSYLVANIA.—The labors of the Supreme Court Justices are greater than those of any other Judges in the State. In the Eastern District alone, during

the year 1892, this Court heard and disposed of 707 cases, the arguments in which must have covered at least 1,000 hours, without including the time spent in consultation and reading opinions; in these cases 1,400 printed paper-books were examined, and 700 opinions written. The State reporter has published up to date over 7 volumes of decisions handed down during 1892, each one of which contains over 600 pages. Well might Chief Justice Paxson say, in speaking of the death of Mr. Justice Clark: 'It may not be inappropriate for me to say that our Brother Clark is the fifth Justice of the Court who has died in commission since I have been a member of it. Our labors are now so exacting that nothing short of a constitution of iron will carry a man through a term of twenty-one years.' (144 Pa. 26.)

**THEORIES OF INSANITY.**—It has been doubted by distinguished minds whether any man lives, or ever has lived, wholly free from a taint of mental unsoundness on all topics, at all times, and under all circumstances. Dr. Johnson declared that "all power of fancy over reason is a degree of insanity," and Montaigne affirmed that between madness and genius there is but "a half turn of the toe." Our ordinary life borders all the time on insanity, according to the philosopher Taine, "and we cross the frontier in some part of our nature." All of which is fair food for speculation and thought among persons of learning and culture. But society cannot entertain any theories of insanity which make men who know what they are doing, and know that it is wicked, unlawful and forbidden on pain of death, unaccountable for their acts. It was the late Chief Justice Cockburn, of England, who, as a young barrister, while pleading for Robert Pate, who struck the Queen in the face with his cane, invented the now well-worn phrase "uncontrollable impulse." Pate, as he argued, struck Victoria under an "uncontrollable impulse." But Baron Alderson, who tried the case, gravely and wittily said in his charge: "The law does not recognize such an impulse. If a person was aware that it was a wrong act he was about to commit, he was answerable for the consequences. A man might say that he picked a pocket from some uncontrollable impulse, and in that case the law would have an uncontrollable impulse to punish him for it." It is reported that a leading criminal lawyer has been retained, through private subscription, to assist the district attorney in the prosecution of the assassin of Mayor Harrison.—*Albany Law Journal*.

# THE LEGAL NEWS.

VOL. XVII.

FEBRUARY 15, 1894.

No. 4.

## CURRENT TOPICS AND CASES.

The recounts demanded by the candidates defeated in the Montreal municipal elections have not changed the result materially, but a considerable amount of valuable time has been consumed. The task of a recount where twenty-three thousand ballots have to be examined, is a serious one, and it might be asked whether the duty could not be performed equally well by other than a judge of the Superior Court. The examination of the ballots, however, has disclosed woful carelessness and ignorance on the part of some of the deputy returning officers. A code of plain directions to these officials seems to be needed, to inform them as to their duties, and also to instruct them as to which ballots should be counted and which rejected, and disobedience to these instructions should be visited with heavy punishment, for it is clear that the result of an election may be changed by the fraud or neglect of a single person among a hundred.

*532.c. Cap. 68 Dec 36 & arts 364 ff. 15 18 S & Q*  
The points decided by Mr. Justice Archibald in the course of the recount *In re McShane*, petitioner, may be concisely stated as follows:—1. Crosses irregularly or unskillfully made—Accepted, where there is no indica-

tion of concerted deviation from the ordinary form. 2. Crosses with wide and black bars—Accepted. 3. Crosses resembling a capital X—Accepted. 4. Crosses accompanied by some other mark—Rejected, unless the other mark appears to have been accidental. 5. Crosses made upon the line between compartments—Counted for the candidate in whose compartment the intersection of the bars occurs. 6. Crosses outside of the compartments allotted to the candidates—Rejected, for uncertainty. 7. A straight line, or other mark not a cross, in a compartment—Rejected. 8. Large crosses extending across the names of both candidates—Rejected. 9. Crosses found on two ballots in the same poll, of a peculiar form, and closely alike—Admitted, where either ballot alone would have excited no suspicion and been accepted, as each ballot must be judged separately. 10. Ballots with crosses or other marks on the back—Rejected, unless the marks were clearly unintentional. 11. Ballots with numbers on the back—Rejected. 12. Ballots not initialed by the deputy returning officer—Rejected. 13. Ballots bearing initials different from those used elsewhere by the deputy—Rejected.

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The death of Mrs. Myra Bradwell, editor of the "Chicago Legal News," occurred on the 14th instant, after a long and painful illness. Mrs. Bradwell, many years ago, was refused admission to the bar of Illinois, on the ground that she was a married woman, and in May, 1873, the judgment of the Supreme Court of Illinois was affirmed by the Supreme Court of the United States. But before this decision was reached, Mrs. Bradwell, in 1868, had established the "Chicago Legal News," of which she continued to be the able managing editor for a quarter of a century. At a later day the legislature came to her aid, and she was conceded the right to practise, but she did not avail herself of it. The legislature of Illinois also afforded her great assistance by passing Acts which

made her journal a valid medium for the publication of legal notices, and evidence in the courts. Mrs. Bradwell was not only devoted to legal pursuits herself, but her family connections were in the same profession. Her husband is a lawyer, and was a judge for a number of years. Her surviving son and daughter are both lawyers, and the daughter has married a lawyer. Mrs. Bradwell leaves a most honorable record as a journalist and was equally esteemed in private life.

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The death of Mr. T. J. Doherty, Q. C., has removed from professional life in Montreal, a gentleman very favorably known to a large circle of his *confrères*. Mr. Doherty has been in poor health for some years, and was compelled to give up work entirely a year ago. He was the eldest son of Mr. Justice Doherty, who recently retired from the bench, and a brother of Mr. Justice C. J. Doherty.

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#### THE MONSON APPEAL.

That the Court of Appeal was right in dissolving the interlocutory injunction recently granted by Mr. Justice Mathew and Mr. Justice Henn Collins in the cases of *Monson v. Madame Tussaud (Lim.)* and *Monson v. Tussaud*, on the fresh evidence which was not before the Divisional Court, it is impossible to doubt. Whether Mr. Monson is or is not ultimately proved to have authorised the negotiation between Mr. Tottenham and the defendants Madame Tussaud (Lim.) for the sale of his gun and shooting clothes and the taking of a better effigy than the one that now stands in Napoleon Room No. 2, within the turnstile which admits curious visitors to the Chamber of Horrors, it is unquestionable that the conflicting affidavits laid before the Court of Appeal made it the imperative duty of that tribunal to leave the issue of alleged license for the jury without any provisional expression of opinion in regard to it. We have, therefore, no adverse criticism to pass on the actual *chose jugée* in these remarkable cases. But the condition in which the judgment of the Court of Appeal has left the numerous, varied, and highly

important legal questions incidentally raised before it is eminently unsatisfactory. The plaintiff's counsel, in both Courts through which Mr. Monson's effigy has now passed judicially, did not press for a decision in his favour on the ground that the exhibition by one person of an unauthorised representation of the face or figure of another can be restrained by injunction; and this interesting practical question, therefore, remains undetermined. There is, of course, no doubt that the ingenious French artist who drew the face of King Louis after the likeness of an over-ripe pear would have met with as scant consideration from English judges as he received from those of France. It hardly needed Mr. Coleridge's elaborate review of the authorities from the time of Charles II — Sir John Culpepper's pillory, *La Belle et la Bête*, and the rest — to establish the proposition that the exhibition of an effigy is libellous if it is intended to excite hatred, ridicule, or contempt. What we should have liked to know is whether in the opinion of the Courts a person who objects to such permanent publicity as the Tussauds assigned to Mr. Monson is not entitled to have his objection enforced and made effective by due process of law. It is perfectly true that there is no authority for an affirmative answer to this question, for *Pollard v. The Photographic Company*, 58 Law J. Rep. Chanc. 251; L. R. 40 Chanc. Div. 345, turned on contract and property in the negative. But neither is there any authority on the other side. Mr. Justice North's query in that case, 'Do you dispute that if the negative likeness were taken on the sly the person who took it might exhibit or sell copies?' is not even an *obiter dictum*. Our American, and probably also our French, neighbours have already solved this question to some extent, and it is to be regretted that the Courts in the *Tussaud Cases* had not the opportunity of making a precedent on the subject. Other questions of equal importance have also been left open by the Courts in these *causes célèbres*. It must now apparently be taken that the old distinction between trade and other libels in the law of interlocutory injunction no longer exists, although Lord Justice Lopes clung with some tenacity to the opposite view during the argument, and said nothing in his judgment to indicate that he had undergone any change of opinion. But the Court of Appeal are far from unanimous on every other point in the cases. Does *Bonnard v. Perryman*, 60 Law J. Rep. Chanc. 617; L. R. (1891) 2 Chanc. 269 — where it was declared by the full Court of Appeal that the

publication of an alleged libel ought not to be restrained by interlocutory injunction, except in the clearest cases — lay down a principle of law? Lord Justice Lopes and Lord Justice Davey hold that it does, and we think they are right; indeed, the notorious history of the case seems conclusive on the point. But Lord Halsbury strongly entertains the contrary opinion. Again, can a person take a photograph picture or representation of another who has been accused of a crime, exhibit it in a permanent form, and defend the exhibition by saying, 'I do this because the public are interested in this person; and it is true that he has been accused of a crime, which is the only allegation (if any) that I make?' Lord Halsbury says, 'No,' partly, it would seem, on the authority of *Leyman v. Latimer*, 47 Law J. Rep. Exch. 470; L. R. 3 Exch. Div. 15, 352. Lord Justice Lopes apparently differs, and holds that in any event the question is one for the jury. Lord Justice Davey preserves a judicial silence. We trust that ere long, in some form or other, these moot points will come before the House of Lords. *Interest reipublicæ ut sit finis litium* is no doubt a salutary principle; but *interest reipublicæ ut sit finis causarum litigandi* is a better one.—*Law Journal* (London).

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### SUPREME COURT OF CANADA

23 Oct., 1893.

KINGHORN v. LABUE.

Quebec.]

*Opposition afin de conserver on proceeds of a judgment for \$1,129—  
Amount in dispute—Right to appeal—R.S.C., c. 135, sec. 29.*

K. (plaintiff) contested an opposition *afin de conserver* for \$2,000, filed by L. on the proceeds of a sale of property upon the execution by K. against H. & Co. of a judgment obtained by K. against H. & Co. for \$1,129. The Superior Court dismissed L's opposition, but on appeal the Court of Queen's Bench (appeal side) maintained the opposition and ordered that L. be collocated *au marc la livre* on the sum of \$930, being the amount of the proceeds of the sale.

*Held*, that the pecuniary interest of K. appealing from the judgment of the Court of Queen's Bench (appeal side) being under \$2,000 the case was not appealable under R. S. C., c. 135, sec. 29. *Gendron v. McDougall* (Cassels's Dig., 2 ed. 429) followed.

*Held*, also, that sec. 3 of 54 & 55 Vic., c. 25, providing for an appeal where the amount demanded is \$2,000 or over, has no application to the present case.

· Appeal quashed with costs.

*Belcourt*, for appellant.

*G. Stuart, Q.C.*, for respondent.

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20 Nov., 1893.

O'GARA v. UNION BANK OF CANADA.

Ontario.]

*Surety—Interference with rights of surety—Discharge.*

The Union Bank agreed to discount the paper of A. S. & Co., railway contractors, endorsed by O'G. as surety, to enable them to carry on a railway contract for the Atlantic & North-West Railway Co. O'G. endorsed the notes on an understanding or agreement with the contractors and the bank that all moneys to be earned under the contract should be paid directly to the bank and not to the contractors, and an irrevocable assignment by the contractors of all monies to the bank, was in consequence executed. After several estimates had been thus paid to the bank, it was found that the work was not progressing favourably and the railway company then, without the assent of O'G., but with the assent of the contractors and the bank, guaranteed certain debts and made large payments directly to the creditors of the contractors other than the bank for monies subsequently earned by the contractors, and in October, 1888, the bank having applied for and got possession of a cheque of \$15,000 accepted by the bank and held by the company as security for the due performance of the contract, signed a release to the railway company "for all payments heretofore made by the company, for labour employed on said contract, and for material and supplies which went into the work." The contract under certain circumstances gave the right to the company to employ men and additional workmen, etc., as they might think proper, but did not give the right to guarantee contractors' debts or pay for provisions and food, etc., due by the contractors.

*Held*, that the payments for supplies and provisions made by the company, for which the bank signed a release without O'G's

assent, were not authorised by the contract and were such a variation of the rights of O'G. as surety as to discharge him.

Taschereau and Gwynne, JJ., dissenting.

Appeal allowed with costs.

*D. McCarthy, Q.C.*, and *A. Ferguson, Q.C.*, for appellant.

*Meredith, Q.C.*, and *Chrysler, Q.C.*, for respondent.

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20 November, 1893.

NEELON v. THOROLD.

Ontario.]

*Company—Stock in—Payment by holders of shares—Appropriation by directors—Formal resolution.*

N., a director and shareholder of a railway company, agreed to lend \$100,000 to the company, taking as security among other things, 168 shares of their stock held by R., who owned altogether 188 shares of \$50 each and had paid thereon \$3,750, or about 40 per cent of their value. Before the agreement was consummated it was found that B. was unable to pay the balance due on said 188 shares, and at a meeting of the directors of the company it was proposed, and decided, to appropriate the sum paid by B. to 75 of his 188 shares, making that number paid up, and offer them to N. in lieu of the 168. N. agreed to this and B. signed a transfer to N. of 75 paid up shares, and retained the balance as stock on which nothing was paid. There was no formal resolution of the board of directors authorising the said appropriation of B's payment.

Judgment creditors of the railway company issued writs of execution on their judgment, which were returned *nulla bona*. They then brought an action against N. for the amount due on their executions, claiming that the \$3,750 paid by B. could not legally be appropriated as it was by the directors, but was paid on the whole 188 shares, and N., therefore, held the 75 shares as stock on which only 40 per cent was paid, and the remaining 60 per cent was still due to the company. The judge trying the action found as facts that N. took the 75 shares believing that they were fully paid up, and relying on the representations of the proper officer of the company to that effect; that if he had had any doubt about it he would not have received them, nor advanced his money; and that he had a general knowledge of what had taken place at the meeting of the board of directors. A judgment in favour of

N. was affirmed by the Divisional Court, but reversed by the Court of Appeal on the ground that the want of a formal resolution authorising the appropriation made the action of the board invalid.

*Held*, reversing the decision of the Court of Appeal, (18 Ont. App. R. 658) and restoring that of the Divisional Court (20 O. R. 86); that as it appeared from the books of the company that the sum paid by B. was not paid on, nor appropriated to, any particular shares, the directors could, with B's consent, re-appropriate it to the 75 shares; that the rights of creditors were not prejudiced as B. was still liable on the balance of his stock; that the matter was not one between the whole body of shareholders and the directors, but only between N. and the company; that the want of a formal resolution by the directors authorising the re-appropriation was a mere irregularity which could not affect the rights of a third party contracting with the company; and that it made no difference that such third party was himself a director of the company and had knowledge of all that had been done.

Appeal allowed with costs.

*W. Cassels, Q.C., and Cox*, for appellant.

*Collier*, for respondents.

20 November, 1893.

#### WEBB v. MARSH.

Ontario.]

*Title to land—Crown grant—Conveyance by grantee out of possession—Disseizin—Statute of Maintenance, 32 H. VIII., c. 9—*

*Conveyance to wife of person in possession—Assent by husband—Statute of limitations.*

In 1828 land in Upper Canada was granted by the Crown to King's College. In 1841, King's College conveyed to G. In 1849, G. conveyed to the wife of M., who had been in possession of the land for some years before the deed to G. in 1841. In an action by the successors in title of M's wife to recover possession, the defendants, claiming through M., alleged that the deed from King's College to G. in 1841, was void under the Statute of Maintenance, being made by a person not in possession of the land, and that G. had, therefore, nothing to convey to M's wife in 1849. They also pleaded the Statute of Limitations, claiming that M. in 1849, had been in possession more than twenty years.

*Held*, affirming the decision of the Court of Appeal (19 Ont. App. R. 564) and of the Divisional Court (21 O. R. 281) that defendants had failed to prove continuous possession by M. for twenty years prior to the conveyance to his wife in 1849; that if he had entered before the grant from the Crown, the Statute of Maintenance would not have avoided the conveyance by the grantee; that for that statute to operate disseizin of the grantor must be established and the Crown could not be disseized, and that the original entry not having been tortious, it would not become so against the grantee from the Crown without a new entry; that though M. entered while the title was in King's College and was in possession when the College conveyed to G., such conveyance was not absolutely void, but at the most was only void as against M.; and that M. having executed the conveyance to his wife must be taken to have assented thereto, and such assent and M's subsequent acts created an estoppel against him, and took the case out of the Statute of Maintenance being a conveyance to a person appointed by the party in possession, which was good under the fourth section of the statute.

Appeal dismissed with costs.

*Riddell and Webb*, for the appellants.

*Roaf*, for the respondents.

20 November, 1893.

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Nova Scotia.]      BROOKFIELD v. BROWN et al.

*Practice—Parties to action—Mortgagees out of possession—Holder of equity of redemption—Effect of transfer of interest.*

The first mortgagee of property on which there were two other mortgages foreclosed two days before the sale under foreclosure. B., the second mortgagee, with an agent's assistance, entered the mortgaged premises and removed the personal property therefrom and certain fixtures attached to the freehold. The sale took place and realized enough to pay off the first two mortgages. On the same day the purchaser at the sale received a deed from the sheriff, an assignment of the third mortgage and a conveyance of the equity of redemption. Some little time after an action was brought against B. and his agent for trespass and injury to the mortgaged property, in which action the first and third mortgagees, the original owner of the equity of redemption and the purchaser at the sale were joined as plaintiffs.

*Held*, affirming the decision of the Supreme Court of Nova Scotia (24 N. S. Rep. 476) Gwynne, J., dissenting, that the owner of the equity at the time of the trespass was the only one of the plaintiffs who could maintain the action; that the first mortgagee could not, after his mortgage had been satisfied by the proceeds of the sale; that the third mortgagee had no *locus standi*, having parted with his interest before action brought; and that the purchaser at the sale, who was also assignee of the third mortgage and equity of redemption, could not, he having had no interest when the trespass was committed.

*Held*, per Gwynne, J., that the third mortgagee, who was in actual possession when the tort was committed, was the only person damnified; that he was not estopped by having consented to the sale under chattel mortgage of the personal property on the mortgaged premises to B., one of the trespassers; and that the tort-feasors could not claim such estoppel even though the amount recovered from them, added to the sum received on assignment of his interest, should exceed his mortgage debt.

Appeal dismissed with costs.

Ross, Q.C., for appellants.

Borden, Q.C., for respondents.

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### QUEEN'S BENCH DIVISION.

LONDON, Feb. 5, 1894.

THE SINGER MANUFACTURING COMPANY V. THE LONDON AND SOUTH WESTERN RAILWAY COMPANY. (29 L. J. 100.)

*Bailment—Deposit of a hired article—Abandonment by hirer—Lien of bailee as against owner—Obligation of railway company to receive deposit—Cloak-room—A "reasonable facility" for traffic, &c.—Railway and Canal Act, 1854 (17 & 18 Vict., c. 31), s. 2.*

Appeal from the Southwark County Court.

The plaintiff company had let out to one Woodman one of their sewing machines under a hire-and-purchase agreement. Woodman had while still in possession of the machine, but when in default of payment of instalments under his contract, deposited the machine at the cloak-room of the defendant company at Waterloo Station, and he did not again call for it. After a lapse

of some months the cloak-room ticket came into the possession of the plaintiffs, who applied to the defendants for the delivery of the article. The defendants declined to deliver up the article unless payment was made of their charge for so warehousing the article. It did not appear for what purpose Woodman had deposited the article, or whether he had travelled or was intending to travel over the company's railway at the time.

His Honour Judge Bristowe held that Woodman was lawfully in possession of the machine at the time of the deposit, and that the defendant company were entitled to their charges for the custody of an article legally deposited with them, but gave leave to the plaintiffs to appeal.

*Cluer*, for the plaintiffs: There is no lien here as against the true owner, only as against the depositor (*Hollis v. Claridge*, 4 Taunt. 807; *Hiscot v. Greenwood*, 4 Esp. 174; *Castellain v. Thompson*, 13 C. B. (N. s.) 105; 53 Law J. Rep. C. P. 79).

*Acland*, for the defendants: A particular lien for warehouse charges on the goods retained by a wharfinger was admitted in *Rex v. Humphrey*, M'Clel. & Y. 173, and is recognised in *Moet v. Pickering*, 47 Law J. Rep. Chanc. 527; L. R. 8 Chanc. Div. 172, and *De Rothschild v. Morrison, Kekewich & Co.*, 59 Law J. Rep. Q. B. 557. Railway companies are bound to give "reasonable facilities" for passengers and traffic. A cloak-room is part of such reasonable facility. They are bound to receive articles there handed in; they have, therefore, just the same lien on such articles for storage as an innkeeper or carrier as against all the world (*Nailor v. Mangles*, 1 Esp. 109; *The South Eastern Railway Company v. The Railway Commissioners*, 50 Law J. Rep. Q. B. 201; L. R. 6 Q. B. Div. 586).

*Cluer*, in reply, cited *Threfall v. Borwick*, 44 Law J. Rep. Q. B. 87; L. R. 10 Q. B. Div. 210.

The COURT (MATHEW, J., and COLLINS, J.) dismissed the appeal, on the ground that the hirer was admittedly entitled, so long as he was in lawful possession of the article, to have carried it by train and so to have deposited it at a cloak-room of a station; that a cloak-room was a "reasonable facility" for the carriage of passengers or their goods which a railway company was bound to provide; that the principles, therefore, of a carrier's lien applied equally to a railway company under such circumstances, and that they were entitled to maintain such lien until their proper charge for safe custody had been paid.

### PHOTOGRAPHING PRISONERS IN ENGLAND.

In a case before Mr. Lane on February 3, counsel for a prisoner stated to the magistrate that while his client had been in custody on remand in Holloway Gaol, four photographs of him had been taken against his will, and submitted to the magistrate that this proceeding was illegal. Mr. Lane declined to interfere, and, we presume, left the defendant to his remedy, if any, by civil action. But we believe the objection is untenable. By section 6 (6) of the Prevention of Crimes Act, 1871 (34 & 35 Vict., c. 112), "a Secretary of State may make regulations as to the photographing of all prisoners convicted of crime who may for the time being be confined in any prison." This enactment was, we believe, for a time regarded as authorising the photographing of every prisoner. But the word "crime" as defined in section 20 of the Act is restricted to a series of offences there specified. This appears to have been drawn to the attention of the authorities, and by section 8 of the Penal Servitude Act, 1891 (54 & 55 Vict. c. 69), the powers of the Secretary of State are extended so as to include the *measuring and* photographing of *all* prisoners who may for the time being be confined in any prison. This extended provision is wide enough to include untried prisoners; and its effect appears to be to legalise the photographing of any person detained in a prison, whether on remand or after conviction; and it is wide enough to include debtors and persons committed for contempt.—*Law Journal*.

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### THE OFFENCE OF REFUSING TO WORK.

Alice King was prosecuted before Mr. Denman, by the guardians of the Wandsworth and Clapham Union, for becoming chargeable to the union by neglecting wholly or in part to maintain herself, though able to do so, which is an offence against section 3 of the Vagrancy Act, 1824 (5 Geo. IV. c. 83). She had absolutely refused to do any work or to take two situations when found for her, and the only energy she ever showed was in breaking the workhouse windows. The facts really raised the question whether idleness is criminal, and Mr. Denman, after consideration, decided that where a person becomes a pauper by his own conduct—*e.g.* by deliberately refusing to earn his living—he is guilty of a criminal offence. And though this may seem strange, we have

no doubt that this has been the law of England for centuries, since the Statutes of Labourers and before the Poor Law. It is to be regretted that the law thus reaffirmed is not severely applied to tramps and all persons who are idle of *malice prepense*, to whatever class they belong.—*Ib.*

[The Criminal Code of Canada, sect. 207, enacts that every one is a loose, idle or disorderly person or vagrant who (b) "being able to work, and thereby or by other means to maintain himself and family, wilfully refuses or neglects to do so;" and by sect. 208 such person "is liable, on summary conviction before two justices of the peace, to a fine not exceeding \$50, or to imprisonment, with or without hard labor, for a term not exceeding six months, or to both."]

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#### THE PHILOSOPHY OF KISSING.

Here is a true and singular story of contemporaneous human interest. A young man in a village near Utrecht, in Holland, kissed a young woman whom he did not know, in the street, and against her wish. She complained to the burgomaster. He fined the offender one florin or imprisonment for one day. There was an appeal, and the "Appeal Court" at Amsterdam dismissed the case. The judges declared that "to kiss a person cannot be an offence, as it is in the nature of a warm mark of sympathy." This decision recalls curious customs that long prevailed in the Netherlands as well as in other countries. It was a universal habit for years for strangers to kiss "other men's wives, widows and maidens, when they made them ceremonious visits;" although there were ancient sages who condemned it. Kornmanus assures us that there were many places in Germany "where it would be looked upon as great unpoliteness for a young man to meet with a maiden without embracing and kissing her." Erasmus was delighted with a similar English custom: "Whithersoever you come, they all receive you with kisses; and whenever you go away, you are dismissed in the same manner. Do you meet with them anywhere you feast upon kisses." But let us ponder the reasonable words of the philosopher De Saint Evremont. "See how the manner of saluting, which is peculiar to our nation, lessens the pleasure of kissing, by making it too common..... Nor do we men get much by it, for as the world stands divided, we must kiss fifty old and ugly

women, if we have a mind to kiss two or three who are handsome. And to a weak stomach, as those of my age generally have, one disagreeable kiss overpays a delicious one."—*Albany Law Journal*.

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#### PORTRAIT PUBLISHED WITHOUT CONSENT.

Judge McAdam, in the New York Superior Court, Dec. 29, 1893, decided that a publication has no right to print a picture of a person, in a voting contest to decide his popularity, as compared with another, without his consent. The decision was handed down in the case of Rudolph Marks against Joseph Jaffa, a publisher. The plaintiff is a Hebrew Actor, at present studying law in the University of the City of New York. The publisher recently started a voting contest to decide whether Marks was the most popular student. Judge McAdam said in his opinion: "If a person can be compelled to submit to have the use of his name and his profile put up in this manner for public criticism, to test his popularity with certain people, he could be required to submit to the same test as to his honesty or morality, or any other virtue or vice he was supposed to possess, and the victim selected would have either to vindicate his character in regard to the virtue or vice selected, or be declared inferior to his competitor, a comparison which might prove most odious; indeed, he might be placed in competition with a person whose association might be peculiarly offensive, as well as detrimental, to him. Such a wrong is not without its remedy. No newspaper or institution, no matter how worthy, has the right to use the name or picture of anyone for such purpose without his consent." An injunction is granted pending trial.—*Ib.*

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#### DEBTS OF HONOR IN CHINA.

The Department of State at Washington has recently issued a series of reports from American consuls abroad on debts of honour, or debts the payment of which cannot be legally enforced. In most countries the same general principles of law prevail as are applicable to the subject in this country. The chief exception is China, where there is a system which the consul at Amoy says, though at utter variance with the systems of other countries, possesses great wisdom and practical merit. All Chinese law is

customary and all litigation is regarded as an evil. There are no lawyers, no costs, no fees. A magistrate hears and settles a case very much as a father determines a dispute between two of his children, or as an arbitrator between two friendly merchants. Litigation being an evil, public policy has increased largely the number of obligations which have no binding nature except the honour of the debtor. Among these are moneys advanced by friends or relatives to start a man in business, to extricate him from trouble, or to help in litigation; money lent to a gambler, spendthrift, drunkard, opium-smoker, or fugitive wife; all debts contracted in inns or gambling hells, all money lent upon parol without security or bond, debts of minors, persons of unsound mind, servants or visitors, services rendered by physicians, priests, fortune-tellers, geomancers, and monks, all commissions and brokerage, and all money lent at a higher rate of interest than 36 p. cent. per annum. Drinking debts are extremely rare, for drunkards, as well as total abstainers, are almost unknown. Gambling debts are pre-eminently debts of honour in China, and are more willingly and speedily paid than any others. To pay them a Chinaman will pawn all his property and even sell his children. For this he is regarded by the public as worthy of all praise, and the relatives who allow themselves to be sold are treated as models of filial devotion. Meanwhile, a tradesman to whom a debt is due may starve. Although payment for professional services cannot be enforced, physicians, sorcerers, scribes, and the like may insist on a bond beforehand, and this can be enforced like any other business security. One way of collecting debts which cannot be enforced by law is for the creditor to visit the debtor's house, sit on the threshold, and weep, expostulate, harangue, *coram populo*, until he is paid. The main security for the payment of debts in China is the fear and disgrace of being a delinquent debtor. 'A Chinaman who becomes financially embarrassed will sell himself for a plantation coolie, go into exile for twenty years, or even commit suicide. It is part of his religion to pay off all he owes in the last week of the year, in order that he may begin the next one free from care and obligation. At this time of the year creditors are lenient and liberal.' The consul at Ningpo describes the Chinese merchant as honourable in all business affairs; 'the great merchants are the soul of honour, and foreigners prefer transacting business with them.'

## GENERAL NOTES.

**NEWSPAPERS AND CRIME.**—At the annual meeting of the Prisoners' Aid Association, at Toronto, the Hon. S. H. Blake, the president, said the reforms he and his confrères wish to effect include a scheme for separating all prisoners awaiting trial for charges which have not been proved against them in the preliminary investigation, from the hardened and well-known criminals. Many of these men may be innocent, but under the present system they forever carried the taint of their surroundings. One of the greatest evils of modern times, Mr. Blake said, was the daily newspaper, with its vile details of every brutal crime as instruction for beginners. Journalists tell the public how to poison folk and how to cover up crime; they have taught young women how to commit infanticide without discovery. The public trial, too, was as bad. Nothing was so disgusting to him as to have to sit in court waiting for another case while a criminal trial was in progress. The court room is crowded with boys and girls, and men and women; the nudging, the ripples of laughter, as the beastly, abominable details were elicited was horrible to contemplate. The incentive to crime supplied by the newspapers and the courts was inestimable. In the majority of cases the criminal was made before he was twenty. Prevention was better than cure. Boys arrested for breaking glass, etc., should be dealt with in a fatherly way. They should not be thrown in with a lot of criminals to be forever contaminated. A reformatory for drunkards should be provided; the present \$2 or thirty days system was a cruel farce. Poverty was not a crime, and not a single man should be in jail because he is insane or destitute. Poorhouses with work for everyone, should be insisted on.

**THE LATE MR. LAFLAMME.**—At a meeting of the faculty of law of McGill University, held on January 26th, the following resolution was passed:—

“That this faculty record an expression of their deep regret at the death of the late Honorable Rodolphe Laflamme, for many years one of the professors of this faculty; they desire to bear tribute to the profound scholarship and extensive experience of their regretted colleague, to his uniform kindness of demeanor towards all who came into contact with him in the faculty, whether as fellow-professors or as students. They bear testimony to the valuable services which he rendered the cause of legal education in connection with the faculty.”

# THE LEGAL NEWS.

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VOL. XVII.

MARCH 1st, 1894.

No. 5.

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## CURRENT TOPICS AND CASES.

The appeal list for March, at Montreal, does not promise to be greatly swollen since the January term, and it is possible that it may be again exhausted before the close of the sittings. It may be observed, however, that the 23rd and 26th are legal holidays, and the 25th is a Sunday. This reduces the term considerably, and the court may follow the precedent of a previous year, and adjourn from Thursday to the following Tuesday. If the business can be concluded by the 22nd it will no doubt be a cause of satisfaction, especially to the Quebec members of the court, who would otherwise have to remain, or return for Tuesday, the 27th.

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The most important question that came up on the 27th February, when the Court of Appeal rendered twenty-four judgments at Montreal, was that affecting the substitution of movables, in *Simpson & Molsons Bank*. It is a curious fact that at this late day, nearly thirty years after the codification of the law, which expressly declared that movable property may be the subject of substitutions (Art. 931), and did not indicate in the usual manner that the disposition was new law, three cases should have occurred almost simultaneously in the Superior Court, in which the judges all held that, before the Code, movable property could not be the subject of substitutions. The

cases are *Massue v. Massue* (Mathieu, J.), 3 C. S. 526, *Mon-genais & Lamarche* (Doherty, J.), 4 C. S. 292, and *Simpson & Molsons Bank* (Taschereau, J.), which went to appeal and was decided on the 27th ultimo. The Court of Appeal, while affirming the judgment on the ground that the bank shares in question were not specifically substituted by the terms of the will, in favor of the testator's children and grandchildren, was unanimous in rejecting the *considérant* upon which the judgment of the Superior Court was based, viz., that substitution of movables was not permitted by the law of this province prior to the Code.

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Ill treatment or torture of a domestic animal is an offence punishable under art. 512 of the Criminal Code, by fine or imprisonment, or both. In the lizard case, noted in the present issue, the only question which had to be decided by the magistrate before issuing a warrant was whether lizards are domestic animals. Mr. Dugas had no difficulty in reaching the conclusion that they are not, and the lizard pedlers escaped prosecution. Hitherto lizards or chameleons certainly have not been considered domestic animals,—in this country at least; and it is not likely that they will become so, the ridicule encountered by those who wished to introduce them as personal decorations having proved an effectual extinguisher.

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It is the subject of very deep and general concern that the improvement in the health of Sir Francis Johnson during the past month has not been as apparent as was hoped for. The learned Chief Justice is in his seventy-eighth year and has held judicial office for twenty-nine years. As advocate and as judge he has been the admiration and pride of the bar for half a century. Time has been impotent to dull the edge of his wit or make his eloquence cold. It would be a graceful act on the part of the government, and one which would be universally approved, to tender the Chief Justice six months' leave of

absence, and, in the event of withdrawal from the burden of official life being desirable, to obtain the sanction of parliament during the approaching session to his retirement without diminution of salary. The case is entirely exceptional and hardly likely to occur again. Of course, this suggestion is made without any knowledge whatever of the Chief Justice's wishes in the matter, and is subject to the preference which he may express.

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At a time when the present Chief of the Superior Court is prostrated by sickness, one of his distinguished predecessors in the same court has passed away. Sir William Collis Meredith died February 26, at Quebec, aged 82. Sir William was born in Ireland, May 28, 1812; was called to the bar of this province in 1836, and created a Q.C. in 1844. The firm of Meredith and Bethune, subsequently Meredith, Bethune and Dunkin, was the most important in Montreal. After declining several offers of office in the administrations of the period, Mr. Meredith was appointed a Justice of the Superior Court in 1849. Ten years later he accepted a seat in the Court of Queen's Bench, a position which he filled during seven years with marked ability and success. In 1866 he left the Queen's Bench to take the Chief Justiceship of the Superior Court which had become vacant. This position he retained until 1884 when he retired from the bench. Two years later he was knighted. The late Chief Justice was a diligent advocate and judge, and conscientious and painstaking in the performance of every duty. The opinions delivered by him from the bench have always been cited with the greatest respect, and many of them are models of what a judicial opinion should be. They excel in clearness, are ample without ceasing to be concise, and bring light and satisfaction to the reader. We cannot better close this brief notice of a distinguished member of the bench than by citing the words of Chief Justice Johnson's telegram to Lady Meredith:—"The Judges of

the Superior Court, here, beg to convey to you and your family their sincere sympathy and condolence. The late Chief Justice Meredith by his lofty conception of duty, his great learning, and his gentleness of character, commanded the admiration and affection of the Bench and Bar of this province." Mr. Justice Davidson was deputed to attend the funeral as the official representative of the Montreal judges.

### *THE LAW APPLICABLE TO LOTTERIES.*

ALBERT P. PIGEON v. EDGAR MAINVILLE.

EDGAR MAINVILLE v. XAVIER POITRAS.

In rendering judgment in these cases in the police court, Feb. 13, 1893, Mr. Desnoyers, police magistrate, made the following observations:—

DESNOYERS, J. P. C.:—

Les défendeurs sont accusés d'avoir, à Montréal, en décembre dernier (1892), vendu des billets pour l'aliénation de biens mobiliers au moyen du tirage au sort, c'est-à-dire, des billets de loterie. La preuve de ces ventes par les défendeurs est faite.

Dans la première cause les défendeurs prétendent tous deux avoir agi sous l'autorité du gouvernement provincial en vertu de l'article 2920 des S. R. P. Q., tel qu'amendé en 1890, le défendeur Mainville alléguant qu'il agissait comme employé de M. Brault, lequel aurait obtenu un contrat des commissaires du gouvernement provincial pour exploiter une loterie au profit de la société St-Jean-Baptiste de Montréal, contrat qui aurait été accepté par M. Brault mais non signé; et le défendeur, Xavier Poitras, alléguant qu'il agissait pour MM. Tourville et Leduc qui avaient obtenu un contrat des mêmes commissaires, mais celui-ci un contrat consenti et signé en bonne et due forme, pour exploiter une loterie toujours au profit de la même société St-Jean-Baptiste de Montréal.

Dans la seconde cause le ci-devant défendeur Mainville, devenu plaignant, contre Xavier Poitras conteste l'autorité provinciale qu'il invoquait dans la première cause et fait reposer sa plainte sur la loi fédérale. J'avoue que je ne possède pas la dextérité nécessaire pour pouvoir lui donner raison dans ses prétentions contradictoires; s'il gagne un de ces points il devra nécessairement perdre l'autre.

Avant de décider si M. Brault ou MM. Tourville et Leduc avaient le contrat du gouvernement provincial il faut d'abord déterminer si c'est la législature provinciale ou le parlement fédéral qui a le droit de légiférer sur cette matière, car il est à remarquer que les deux parlements ont des lois prohibitives concernant les loteries ; ces lois sont à peu près analogues avec cette distinction, toutefois, que le statut provincial (art. 2920) permet certaine loterie dans certains cas avec la permission préalablement obtenue du lieutenant-gouverneur en conseil, tandis que le statut fédéral ne fait aucune telle exception. Si c'est la loi fédérale qui nous gouverne les deux défenseurs sont également en contravention. Il faut donc remonter à la source des pouvoirs pour déterminer si c'est la loi fédérale ou la loi provinciale qui s'applique.

La première loi concernant les loteries qui ait été introduite dans nos statuts, l'a été en 1856, sous l'Union des Canadas et infligeait une amende de \$20 à quiconque annoncerait une loterie, vendrait ou achèterait un billet de loterie. Cette loi a été reproduite dans les statuts refondus du Canada promulgué en 1859 (sous l'union), chap. 95. En 1860 le parlement du Canada (encore sous l'union) a, par un statut, chap. 36, déclaré que la loi de 1856 ne s'appliquait pas aux rafles faites dans les bazars tenus dans un but de charité.

Telle était la loi statutaire du pays concernant les loteries lors de l'avènement de la confédération en 1867. En 1869 (sous le régime de la confédération) la législature de Québec assumant que les lois concernant les loteries tombaient dans sa juridiction, a passé un statut, chap. 36, amendant le dit chapitre 95 des statuts refondus du Canada et le dit statut de 1860, et permettant les loteries faites dans le but d'aider à la construction ou au soutien ou au paiement des dettes d'une église, chapelle, hôpital, salle d'asile, établissement d'éducation, société de colonisation, etc., etc.

Les statuts refondus de la province de Québec promulgués en 1869—articles 2911 à 2923—reproduisent comme lois provinciales toutes les lois ci-dessus citées de 1856, Canadas-Unis, de 1859, Canadas-Unis, 1860 Canadas-Unis, et 1869, province de Québec.

En 1890, première session, la législature de Québec a passé un statut, chap. 36, amendant l'article 2920 des S. R. P. Q. à l'effet d'autoriser les loteries qui pourraient être faites pour aider à la construction d'un établissement d'intérêt public ou d'instruction : pourvu que la permission du lieutenant-gouverneur en conseil

soit obtenue au préalable dans le cas où ces loteries auraient un caractère de permanence. De son côté le parlement fédéral en 1883, a passé le statut, chap. 36, (étant la première législation fédérale concernant les loteries depuis l'avènement de la confédération). Ce statut déclare que les sociétés incorporées ont le droit de distribuer des objets d'art en les faisant tirer au sort entre leurs membres, et contient le dispositif suivant : "Aucune disposition des statuts concernant les loteries actuellement en vigueur en Canada ou *dans quelque une des provinces du Canada* ne se lira ou ne s'interprétera comme qualifiant d'offense la distribution, etc., etc.," (des objets d'art).

Les statuts révisés du Canada promulgués en 1887 au chap. 159 reproduisent comme lois fédérales, tous les statuts ci-dessus cités de 1859 Canada, de 1860 Canada, et 1883 Confédération. Enfin en 1892 le parlement fédéral a codifié les lois criminelles du Canada (chap. 29, lequel code deviendra en force le premier juillet prochain, 1893), et d'après ce code (art. 205) non seulement les infractions aux lois de loterie sont considérées du ressort fédéral, mais le fait d'annoncer une loterie ou de vendre un billet de loterie est déclaré être un acte criminel punissable par deux ans d'emprisonnement et \$2,000 d'amende. Le parlement fédéral comme la législature provinciale tirent leurs pouvoirs de l'acte de l'Amérique Britannique du Nord, acte de la confédération. La partie 6e de cet acte traite des pouvoirs législatifs. La section 91, donne au parlement fédéral le pouvoir de faire des lois pour la paix, l'ordre et le bon gouvernement du *Canada* relativement à toutes les matières ne tombant pas dans les catégories de sujets exclusivement assignés aux législatures des provinces. La section 92 déclare que la législature provinciale pourra exclusivement faire des lois relatives aux matières tombant dans les catégories de sujets qui y sont énumérés au nombre de seize, parmi lesquels :

80. Les institutions municipales.

90. Les licences de boutiques, de cabarets, d'auberges, d'encanteurs et autres licences dans le but de prélever un revenu, pour des objets provinciaux, locaux ou municipaux ;

130. La propriété et les lois civiles dans la province ;

160. Généralement toutes les matières d'une nature purement locale ou privée dans la province.

Je ne mentionne que ces quatre paragraphes parce que ce sont ceux de la section 92 qui ont été cités à l'appui de la prétention

que la législation provinciale doit être suivie en matière de loterie : au reste ce sont les seuls qui se rapprochent du sujet qui nous occupe.

Comme nous venons de le voir, la section 91 décrète que le parlement fédéral pourra faire des lois pour la paix, l'ordre et le bon gouvernement du *Canada* relativement à *toutes les matières* ne tombant pas dans les catégories de sujets exclusivement assignés aux législatures. Peut-on dire d'après les quatre paragraphes de la section 92 ci-dessus cités, que les loteries tombent dans les catégories de sujets *exclusivement* assignés aux législatures ? Certainement non. Donc le parlement fédéral a juridiction et cette cour présidée par M. le juge Dugas l'a déjà décidé ainsi dans la cause de Harper, en juin 1892, et je concours dans cette décision.

Le droit du parlement fédéral de légiférer sur la matière des loteries étant établi, il s'agit de savoir si la législature n'a pas un pouvoir analogue et concurrent et si elle a ce pouvoir, laquelle des deux législations doit prévaloir ?

Revenons à la section 92, pouvoirs provinciaux.

Le 8e paragraphe parle des institutions municipales dans la province. On ne peut rattacher les loteries à ce paragraphe. Il n'y a pas de rapport entre le pouvoir municipal et les loteries.

Il pourrait peut-être y en avoir dans le cas où le pouvoir municipal considérant les loteries comme nuisance publique interviendrait pour les défendre ; mais je ne vois pas comment le pouvoir municipal ou même le pouvoir provincial pourrait autoriser ou réglementer une nuisance publique.

Le 9e paragraphe, licences de boutiques, etc., etc. Ce paragraphe s'éloigne encore davantage du sujet des loteries.

Le 13e paragraphe, la propriété et les lois civiles dans la province. Je suis d'avis que le pouvoir provincial pourrait légiférer en vertu de ce paragraphe et permettre la loterie comme un des moyens d'acquérir une propriété ou une chose quelconque.

La même remarque peut s'appliquer au 16e paragraphe : "Généralement toutes les matières d'une nature purement locale ou privée dans la province." Mais, à mon avis, ces lois provinciales ne pourraient avoir aucun effet en regard de la loi fédérale, défendant absolument et nommément les loteries. Le parlement fédéral ayant statué une défense d'annoncer des loteries ou de vendre des billets de loterie dans tout le Canada, je ne vois pas comment la législature pourrait faire l'exception contenue dans l'article 2920 de ses statuts refondus, tel que amendé.

DÉC.

Dans le cas de conflit entre la législation fédérale et une législation provinciale, quand il s'agit d'un sujet sur lequel le parlement fédéral a juridiction, la loi fédérale doit prévaloir. Ainsi jugé dans plusieurs cours et nommément par la cour suprême du Nouveau-Brunswick, dans la cause de *Ward v. Reid*, rapportée dans le 22<sup>e</sup> volume des N. B. R., page 279. Dans cette cause il a été jugé que la loi fédérale qui permet de poursuivre le recouvrement d'une pénalité contre un juge de paix devant n'importe quelle cour d'archives, pour négligence de faire rapport d'une conviction par lui prononcée, doit l'emporter sur la loi provinciale qui déclare que les cours de comté n'ont pas juridiction dans les actions contre les juges de paix.

Le même principe a été maintenu par la même cour dans la cause *Kinney v. Dudman*, rapportée dans le 2<sup>e</sup> volume de *Cartright*, "Cases decided on the B. N. A. Act, 1867," page 412;

Aussi par la cour supérieure du district d'Arthabaska, juge *Plamondon*, dans la cause de *Côté v. Watson*, volume 3, Q. L. R., page 157;

Aussi par la cour suprême du Canada dans la cause de *Clarkson et Ryan*, rapportée au 17<sup>e</sup> volume, p. 251 des rapports de la dite cour;

Aussi par le conseil privé dans la cause de *Cushing v. Dupuy*, rapportée dans le 1<sup>er</sup> vol. de *Cartright*, p. 252;

Aussi par le conseil privé dans la cause de *Valin v. Langlois*, rapportée au 1<sup>er</sup> vol. de *Cartright*, p. 158.

D'autre, dans sa Constitution du Canada, p. 120, cite les remarques du juge Gwynne dans la cause de l'élection de Niagara. Dans cette cause le juge Gwynne faisant la comparaison entre la constitution américaine et celle du Canada, quant à la distribution des pouvoirs législatifs, après avoir reproduit les paroles suivantes d'un juge américain, parlant de la constitution américaine : "les pouvoirs du gouvernement général sont composés des concessions faites par les divers états : ce qui n'est pas explicitement conféré au pouvoir fédéral est expressément réservé au pouvoir local," ajoutait : "avec nous, en Canada, c'est tout le contraire. Le gouvernement fédéral et les diverses législatures provinciales émanent toutes du pouvoir souverain, le parlement impérial. Les législatures provinciales n'ont aucune autre juridiction que celle qui leur est conférée par le statut qui les a créées; tandis que ce même statut confère au parlement fédéral le pouvoir de faire des lois non seulement sur des sujets spécialement énu-

"mérés mais sur toutes les matières qui ne sont pas exclusivement assignées aux législatures des provinces."

De plus, la section 91 du dit acte de la confédération donne au parlement fédéral le pouvoir exclusif de légiférer en matière de lois criminelles (parag. 27). Les loteries ne tombent-elles pas dans la catégorie des lois criminelles ?

Dès le règne de Guillaume III (10<sup>e</sup> et 11 Guil. III, ch. 17), c'est-à-dire vers l'an 1700, les loteries ont été déclarées en Angleterre être des nuisances publiques et ont toujours été depuis considérées et traitées comme telles, à l'exception de certaines loteries spécialement autorisées par acte du parlement. Le statut impérial, 12 Geo. II, ch. 28 (1739), qui est un acte pour la répression plus efficace des jeux de hasard, et une extension du dit acte 10 et 11 Guil. III, ch. 17, impose une pénalité de £200 contre quiconque annoncera ou fera une loterie ou tout autre jeu de hasard ; la dite pénalité recouvrable par poursuite sommaire devant un juge de paix.

Nonobstant cette procédure sommaire les infractions aux dispositions du dit statut 10 et 11 Guil. III, chap. 17, ont toujours été considérées en Angleterre comme des délits poursuivables par voie d'acte d'accusation ; c'est ce qui a été décidé par la cour pour les causes réservées de la couronne dans la cause de la Reine v. Cranshaw, jugée en 1860 et rapportée dans le 30<sup>e</sup> vol. des Rapports du Law Journal, causes des magistrats, p. 58.

Le statut impérial de 1774, 14 Geo. III, ch. 83, sec. 11, a introduit en cette province les lois criminelles anglaises qui étaient d'application générale.

Les cours du Haut-Canada ont déclaré ces statuts 10 et 11 Guil. III, et 12 Geo. II, en force dans la province supérieure et les y ont appliqués comme lois criminelles y ayant été introduites tant par le dit acte impérial de 1774 (le Haut-Canada faisant alors partie de la province de Québec) que par un acte de la dite province supérieure 40 Geo. III, ch. I, voir les remarques du juge-en-chef Sir John Beverly Robinson, dans la cause de Cronyn v. Widder et al, rapportée au 16<sup>e</sup> vol. U. C. Q. B. R., p. 356.

Une loi anglaise sur un sujet absolument analogue, la 6<sup>e</sup> Geo. II, ch. 35, qui impose une pénalité également sévère contre quiconque vend des billets d'une *loterie étrangère*, a été déclarée en 1828, par le juge-en-chef Sewell à Québec avoir été introduite dans cette province comme faisant partie des lois criminelles anglaises, par le dit acte de 1774, voir ex parte Rousse, rapportée dans les rapports du Bas-Canada de Stuart, p. 321.

De sorte que dès avant la passation de notre statut, 1856, les loteries dans cette province étaient, d'après les lois en force, des nuisances publiques et ceux qui les annonçaient ou les faisaient étaient traités comme infracteurs des lois criminelles. Le statut de 1856 n'a pas changé la nature de ces offenses. Pour ces raisons je pense que le parlement fédéral a seul le pouvoir de légiférer au sujet des loteries.

J'admets que le statut fédéral de 1883 est conçu dans des termes qui font croire que ses auteurs avaient des doutes sur leur droit exclusif de légiférer en matière de loterie ; mais cette hésitation de la part du parlement ne peut être invoquée comme une décision judiciaire et ne change en rien la loi qui existait alors.

On s'est appuyé sur la négligence du gouvernement fédéral de désavouer la législation provinciale au sujet des loteries dans les délais voulus, et on a invoqué cette négligence comme un acquiescement que la loi des loteries était du ressort provincial. Je ne puis pas adopter cette opinion. Je n'ai aucun moyen de connaître les raisons du silence du gouvernement fédéral au sujet de ces actes non désavoués, mais je puis affirmer que ce silence ne change pas les droits provinciaux.

De plus, il existe un grand nombre de décisions déclarant *ultra vires* des actes provinciaux qui n'avaient pas été désavoués.

Il est peut-être regrettable qu'une question de cette importance doive être jugée par un tribunal inférieur ; mais à cela je ne puis rien. Je n'ai pas à choisir. Les plaintes ayant été portées devant cette cour je n'ai qu'à les juger suivant mes faibles lumières. J'ai cependant la satisfaction que les parties pourront facilement et promptement faire rectifier ma décision si elles s'en croient lésées. D'après ce qui précède je suis dispensé d'adjuger sur les prétentions des défendeurs, savoir, lequel des deux avaient obtenu le contrat des commissaires du gouvernement provincial.

Les deux défendeurs sont condamnés à payer chacun la somme de vingt piastres et les frais, et à défaut de paiement saisie de leurs biens.

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#### LIZARDS NOT "DOMESTIC ANIMALS."

The Society for the Prevention of Cruelty to Animals having applied for a warrant at the Police Court, Montreal, against one Graetz, who was exposing lizards for sale, Mr. McGibbon, Q.C., solicitor of the Society, submitted the following in support of the application :—

The information alleges specific cruelty to six lizards, stated to be "domestic animals," and to have been exposed for sale by said defendant as "pets, ornaments and toys." The question arises whether a warrant should issue in view of the fact that it is questionable whether "lizards" are "domestic animals" or not. I submit that enactments such as the provisions of the Criminal Code relative to cruelty to animals are entitled to a liberal construction, according to their spirit and intention. The fact that the purport and objects of the Cruelty to Animals acts are of the most beneficent character and appeal to every humane instinct, entitles them to this broad and liberal construction and interpretation. Nothing would seem to be clearer than that the object of this act would include such an act as that charged, viz., cruelty to dumb animals, sold and used as pets and ornaments, and that irrespective of the consideration whether lizards generally are "domestic animals" or not. These special "lizards," reduced to captivity, domesticated and tamed to such a degree as to enable persons to sell them for pets or ornaments of personal attire, must, it seems to me, be within the scope of the term "domestic animals," as employed in the statute. The word "domestic" is susceptible of a multiplicity of definitions, but, I contend, is used in this statute as synonymous with "tame" and the opposite of "wild." See sub-section C. Surely the Legislature did not intend to confine the operation of the statute to the conventional domestic animals of everyday conversation, and to permit the most wanton cruelty to other creatures simply because, although they were tamed—reduced to captivity—had become the subjects of property and ownership, part and parcel of one's household goods and personal effects, either as toy, pet or jewellery—simply because the species to which they belong was not popularly included among the "domestic animals." The intention of the act, it is submitted, is to include within its benevolent operation all animals under man's control and government, all those which become his property and require his care, attention and kindness. Especially is this the case when the animal, even in its wildest and most absolutely natural condition, is of a gentle and kindly disposition, as these little lizards are. In no proper sense of the word can they be said to be "wild," or anything but "tame," and therefore "domestic." They are not vicious, and the very purposes for which they are sold distinguish them as tame and not wild and ferocious. In this view, then, I contend

that the informant is entitled to the benefit of any doubt, at this stage of the case, in respect of the issue of the warrant, leaving to us at the trial to remove by argument and scientific evidence and further authority, any hesitation your Honor may entertain about including these lizards as "domestic animals."

On Feb. 17 Mr. Dugas, police magistrate, gave his decision as follows :—

Application has been made before me to issue a warrant against one Frederick Graetz, for having wantonly, cruelly and unnecessarily ill-treated, abused and tortured certain domestic animals, that is to say, six lizards, otherwise known as American chameleons, by exposing the said lizards for sale as pet ornaments and toys, with rings fastened round their necks, to which chains and pins were attached ; by depriving the said lizards of their natural and proper food ; by exposing them to cold ; by confining them in paper boxes, and depriving them of their natural warmth and sunshine, to which they are accustomed.

The law punishes ill-treatment of cattle, poultry, dogs, "domestic animals," or birds. Here, it is alleged that the cruelty was exercised towards domestic animals, to wit, the six lizards in question, and therefore I have to decide whether such reptiles fall under the general denomination of domestic animals. A very able factum has been produced by Mr. McGibbon, in order to convince me that the fact of these animals being bought, or having been bought and sold as pet ornaments and toys, makes of them the animals which the law has in view under the words "domestic animals."

I must declare immediately that I cannot come to such a conclusion. Whatever sympathy personally I may have for animals generally, whether wild, tame or domesticated, and while I heartily approve of whatever is done to prevent any unnecessary cruelty towards them, I cannot see that I can make of a lizard, a chameleon or any other reptile, such for example, as frogs, toads or snakes, an animal which may be considered a domestic animal in the true sense of the word.

The craze which temporarily may exist for having possession of such a beast, whether actuated by curiosity, by the novelty of the thing, or by the desire to make a study of an animal really interesting in its nature and its habits, do not, for the time being at all events, make it fall within the category of those animals which have been domesticated in this country. I admit that the

category of animals which can be submitted to domestication can be extended or diminished in number, according to circumstances and localities, but it is not sufficient that in order to be considered as having been brought to domestication, that on account of the root of the word animals should make themselves our guests in our homes, whether by or against our will and interest; for instance, rats, mice and flies. I find in one of our French books a definition of what has in recent times been accepted as a true definition of what is a domestic animal:—

“Would a bird which has just been taken away from a wild life and put in a cage, or would a wolf which has just been chained, be considered as domestic animals for the sole reason that they are fed in the house? No. They are only captive, and even, if, later and without their immediately running away, we could open the door of the cage of one or unfasten the chain of the other, they would then still only be tamed, private, but not domestic. Domesticity is manifestly more than the state of taming, as taming is more than simple captivity; in other words, domestication is the art of taming the wild species, and to realize the position completely enough so that they will reproduce themselves usefully in our midst, and, when so reproducing themselves, they will adapt themselves to all our needs. Domesticity is the result of domestication.”

Finding, therefore, that whatever has been done with the lizards or chameleons in question, I cannot say that they have been yet brought under the definition which I have just cited, I believe that the law as it exists does not intend to go so far as to reach the present case, and I refuse to grant the warrant asked for.

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#### SANCTUS IVUS.

A correspondent writes to Mr. George Murray, editor of “Notes and Queries,” as follows:

SIR,<sup>1</sup>Your correspondent “Themis,” who asked about a fortnight ago for the remaining lines of the hymn beginning

Sanctus Ivus erat Breto,  
Advocatus sed non latro,  
Res miranda populo,

ought to have guessed—for he is evidently a keen-witted man—that the lines are complete in themselves, that they constitute an epigram. Mgr. Guérin, in his 17-volume collection of the “Lives

of the Saints," quotes them as "un trait contre la docte confrérie dont il avait été un des plus illustres membres." His version is as follows :

Sanctus Yvo erat Brito,  
Advocatus et non latro,  
Res miranda populo,

which he translates thus :

Saint Yves était Breton,  
Avocat et non larron,  
Grande merveille ! dit-on (vol. vi., p. 34) ;

and for which I humbly suggest this English equivalent :

Saint Yves of Breton courts was chief,  
A lawyer and yet not a thief ;  
The people said 'twas past belief.

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The letter of "Themis" was as follows :

*To the Editor of Notes and Queries.*

Sanctus Ivus erat Breto,  
Advocatus sed non latro,  
Res miranda populo.

SIR,—From the abundance of knowledge that crams both your head and your bookshelves, would you be pleased to supply me, a servant of yours and of Themis, the remaining lines of the Gallican hymn whose beginning I've written above, but have never so far seen printed. They are, I am told, the first lines of a hymn composed to the honor of Ives, an old Breton saint, and the patron of much maligned lawyers. In the knowledge of law, it appears, he was rich, and for wisdom distinguished, but, like his brethren, was poor, had much honor, but few *honoraria*. These verses, no doubt, must be old, perhaps for that reason are curious, and for another as well, because from their old-fashioned author we learn that old as his verse, is the vulgar or popular error that lawyers, the servants of justice, themselves are unjust and dishonest. But we may at the same time perceive, though the sarcasm isn't too evident, his own contempt, half-concealed, for such vulgar and stupid opinions. The old scholar tells that Saint Ives was born of a race that we know of—a race that has sent to our bar, to our bench and our parliaments, advocates learned in law, just judges and eminent statesmen ; but it is amazing to learn how the people of those times wondered—just as they won-

der to day—as the man in Chicago wondered, when on a tomb he read in a churchyard of the Fair City :

HERE LIES  
John Blackstone Smith,  
AN HONEST MAN,  
and  
A LAWYER.

His wonder lessened at last, construing the startling inscription ; yet it was strange, he thought, that such uncongenial fellows, enemies all their lives, should in death at last be united. So he asked of the first passer-by, " Why were *these two men* buried together ? "

Be pleased to believe me to be, with the highest consideration (though I cannot claim to be French), yours and a servant of

THEMIS.

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#### GENERAL NOTES.

JESSEL ON THE BENCH.— " Jessel," says an old friend, " was a man who knew everything and had done everything. One day in the Rolls, Chitty (now Mr. Justice Chitty) was arguing, and the difficulty of milking a cow somehow came up. Says Chitty : " There can be no difficulty in so simple an operation ; no special skill is needed. " Mr. Chitty," said the Master of the Rolls, " did you ever try to milk a cow ? " " No, my lord, I can't say I ever did. " " Well, I have, and can tell you that it's a very difficult thing to do the first time ; and milking a cow requires considerable special skill. " Two or three days before he finally gave up sitting his family were asking him to rest, and not encounter the worry of a hard day in court. " Oh, to-morrow," he said, " Bowen [now Lord Justice] is going to sit with me, and I shall have quite an easy day, since he is some assistance, and doesn't need continually to be kept from going wrong. "—*Law Times*.

" MOANING AT THE BAR. " — When Sir James Fitzjames Stephen, under circumstances that are still fresh in the public mind, resigned his judicial position, he took a semi-public farewell from bench and bar. It was a dismal enough scene and

when it was over, and as the judges were filing out, Lord Justice Bowen is said to have muttered to one of his learned colleagues:

"And may there be no moaning at the bar  
When I put out to sea."—*Globe*.

**DON'T WORRY.**—A lawyer's work, like a woman's, is never done; and the secret of personal ease and of longevity lies in the ability to step in and out of the harness, without worry as to results, according to the immediate necessity for work or the present opportunity for relaxation and forgetfulness.—*New York Law Journal*.

**THE POINT SETTLED.**—Not long since, in the course of a trial before a certain justice of the peace in Texas, counsel for the defendant requested the court to rule on a certain point, whereupon counsel for plaintiff, whose name was Charley, insisted that the court had already passed on the point. After considerable argument, and due deliberation on the part of the court, the justice (who was Irish) said: "Charley, this court has niver passed on that p'int." "Well," said Charley, "Will your honor pass on it now?" "I do pass on it now," responded the court, with infinite dignity. "Well, how does your honor pass on it?" inquired the perplexed counsel. The court straightened himself up, cleared his throat, and relieved himself by delivering the following, in the most impressive manner: "Charley, ye must abide by the law, whatever it is."—*Central Law Journal*.

**AUCTION BY THE CANDLE.**—One of those curious old-time sales by auction by the candle has just taken place at Aldermaston, the historic Berkshire village, which was recently purchased by Mr. Keyser, of Merry Hill House. The 'Church Acre,' which is let every three years in accordance with ancient custom, is a piece of meadow land about two and a half acres in extent, bequeathed some centuries ago to the vicar and churchwardens of the parish for church expenses. The method of letting is similar to that pursued in various parts of the country, and was quite the common way a century ago. A candle was lighted and one inch below the flame duly measured off, at which point a pin was inserted. The biddings for the rental of the land began and continued till the inch of candle was consumed, when the pin dropped out. The last bidder before the full of the pin was declared by the vicar, who presided, to be the purchaser.—*Law Journal*.

# THE LEGAL NEWS.

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VOL. XVII.

MARCH 15th, 1894.

No. 6.

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## *CURRENT TOPICS AND CASES.*

Since the amendment of the Code of Procedure by 55 Vict. c. 49 (A.D. 1890), appeals are entered upon the roll for hearing as soon as the parties have filed their appearance. The law requires that each party shall file his factum within fifteen days after judgment upon the exceptions or demurrers if there are any to the proceedings, or within fifteen days after the expiration of the delay for filing appearance. But in practice this seems to be almost totally disregarded. Indeed, the fact that the case now gets a place upon the roll for hearing before any factum is filed by either side, seems to have made counsel more dilatory than ever in producing their factums. The result is that on the March roll at Montreal, out of 77 cases which appear there, only four are indicated as complete with the factum filed by both parties. There are 17 others in which one of the parties has filed his factum. Under the old system, therefore, of not putting cases on the printed list until one factum at least had been filed, the March roll would contain only 21 cases instead of 77. The court may find it desirable to regulate this matter in some way, as at present it is impossible to form any idea from the printed list as to the cases which are coming on for hearing.

It appears that a fair amount of new business was proceeded with between January and March, the roll for the latter month showing 21 new appeals. It is a curious fact that during this period the country cases outnumbered the city appeals, there being only ten appeals from the Montreal district and 11 from the outside districts. The country appeals have been becoming more numerous if not more important from year to year, and now out of a total of 77 cases on the March list the country cases number 27.

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In *Rocheleau & Bessette* the Court of Appeal (Montreal, Feb. 27), unanimously affirmed the decision of the Court of Review reported in R. J. Q., 3 C. S. 320. The question was whether a judgment operates novation of the debt upon which it is based. Both courts held in the negative. A debt created in the United States does not cease to be a debt originating in a foreign country, when the debtor removes to this province and the creditor obtains judgment thereon here. Hence, under Art. 806 of the Code of Procedure, a writ of *capias* cannot issue for such debt. Nor can it issue for the interest and costs due under the judgment, these being accessories only, and following the nature of the original debt.

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In *DeCow v. Lyons*, Taschereau, J., in the Superior Court, Montreal, Dec. 23rd, 1893, held that a statement made confidentially by a druggist to a customer concerning a physician—the statement being in answer to a question asked by the customer in the course of a private conversation—is privileged. The fact that the person to whom the statement was made repeats it to others does not affect the position of the person originally making it.

Mr. Justice Brooks, Judge of the Superior Court for the district of St. Francis, has obtained leave of absence. The learned judge succeeded to the vacancy at Sherbrooke caused by the transfer of Judge Marcus Doherty from Sherbrooke to Montreal in 1882. Few members of the bench have been worked harder than Judge Brooks during the past twelve years, and we join sincerely in the hope that the well earned rest may be beneficial to him.

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### EXCHEQUER COURT OF CANADA.

OTTAWA, February 19, 1894.

Present BURBIDGE, J.

JOHN DEKUYPER & SON V. VAN DULKEN, WIELAND & Co.

*Trade Mark—Registered and unregistered mark—Jurisdiction of Court to restrain infringement—Exactness of description of device or mark—Use of same by trade before registration—Effect of—Rectification of register.*

1. The Exchequer Court has no jurisdiction to restrain one person from selling his goods as those of another, or to give damages in such a case, or to prevent him from adopting the trade label or device of another, notwithstanding the fact that he may thereby deceive or mislead the public, unless the use of such label or device constitutes an infringement of a registered trade-mark.

2. In such a case the question is not whether there has been an infringement of a mark which the plaintiff has used in his business, but whether there has been an infringement of a mark as actually registered.

3. When any one comes to register a trade-mark as his own and to say to the rest of the world "here is something that you may not use," he ought to make clear to everyone what the thing is that may not be used.

4. In the certificate of registration the plaintiff's trade-mark was described as consisting of "the representation of an anchor, with the letters "J. D. K & Z," or the words "John DeKuyper & Son, Rotterdam, &c., as per the annexed drawings and application. In the application the trade-mark was claimed to consist

of a device or representation of an anchor inclined from right to left in combination with the letters "J. D. K & Z," or the words "John DeKuyper & Son, Rotterdam," which, it was stated, might be branded or stamped upon barrels, kegs, cases, boxes, capsules, casks, labels and other packages containing geneva sold by plaintiffs. It was also stated in the application that on bottles was to be affixed a printed label, a copy or *fac simile* of which was attached to the application, but there was no express claim of the label itself as a trade-mark. This label was white and in the shape of a heart, with an ornamental border of the same shape, and on the label was printed the device or representation of the anchor with the letters "J. D. K & Z," and the words "John DeKuyper & Son, Rotterdam," and also the words "Genuine Hollands Geneva" which it was admitted were common to the trade. The plaintiffs had for a number of years prior to registering their trade-mark used this white-heart-shaped label on bottles containing geneva sold by them in Canada, and they claimed that by such use and registration they had acquired the exclusive right to use the same.

*Held*:—That the shape of the label did not form an essential feature of the trade-mark as registered.

5. The defendants' trade-mark was, in the certificate of registration, described as consisting of an eagle having at the foot V. D. W. & Co., above the eagle being written the words "Finest Hollands Geneva"; on each side are the two faces of a medal, underneath on a scroll the name of the firm "VanDulkin, Wieland &c.," and the word "Schiedam," and lastly at the bottom the two faces of a third medal in the shape of a heart (*le tout sur une étiquette en forme de cœur*). The colour of the label was white.

*Held*:—That in view of the plaintiff's prior use of the white-heart-shaped label in Canada, and the allegation by the defendants, in their pleadings, that the use of a heart-shaped label was common to the trade prior to the plaintiff's registration of their trade-mark, that the defendants had no exclusive right to the use of the said label, and that the entry of registration of their trade-mark should be so rectified as to make it clear that the heart-shaped label forms no part of such trade-mark.

*H. Abbott, Q. C., and Campbell, for plaintiffs.*

*A. Ferguson, Q. C., and Duhamel, Q. C., for defendants.*

## JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

LONDON, Feb. 23, 1894.

*Present*:—THE LORD CHANCELLOR, LORD WATSON, LORD  
MACNAGHTEN and SIR RICHARD COUCH.

THE ATTORNEY GENERAL OF ONTARIO V. THE ATTORNEY GENERAL  
FOR THE DOMINION OF CANADA.

*Constitutional Law*—R. S. O. ch. 124, s. 9—*Bankruptcy and  
Insolvency*—B. N. A. Act, s. 91—*Voluntary assignments*.

**HELD**:—Section 9 of the Revised Statutes of Ontario, ch. 124, which enacts that "an assignment for the general benefit of creditors under this Act shall take precedence of all judgments and of all executions not completely executed by payment," relating as it does to assignments purely voluntary, does not infringe on the exclusive legislative authority conferred upon the Dominion Parliament in matters of bankruptcy and insolvency by s. 91, no. 21 of the B. N. A. Act, more particularly when there is no bankruptcy or insolvency legislation of the Dominion Parliament in existence.

The LORD CHANCELLOR, in delivering the judgment of the Committee said:—

This appeal is presented by the Attorney-General of Ontario against a decision of the Court of Appeal of that province. The decision complained of was an answer given to a question referred to that court by the Lieutenant-Governor of the province in pursuance of an order-in-council. The question was as follows: "Had the legislature of Ontario jurisdiction to enact section 9 of the Revised Statutes of Ontario, chapter 124, and entitled 'An Act Respecting Assignments and Preferences by Insolvent Persons.'" The majority of the court answered this question in the negative, but one of the judges who formed the majority only concurred with his brethren, because he thought the case was governed by a previous decision of the same court; had he considered the matter *res integra* he would have decided the other way. The court was thus equally divided in opinion. It is not contested that the enactment, the validity of which is in question, is within the legislative powers conferred on the provincial legislature by section 92 of the British North America act, 1867, which enables that legislature to make laws in relation to pro-

perty and civil rights in the province, unless it is withdrawn from their legislative competency by the provisions of section 91 of that act, which confers upon the Dominion Parliament the exclusive power of legislation with reference to bankruptcy and insolvency.

The point to be determined, therefore, is the meaning of those words in section 91 of the British North America act, 1867, and whether they render the enactment impeached *ultra vires* of the provincial legislature. That enactment is section 9 of the Revised Statutes of Ontario of 1887, c. 124, entitled: "An Act respecting Assignments and Preferences by Insolvent Persons." The section is as follows:—"An assignment for the general benefit of creditors under this act shall take precedence of all judgments and of all executions not completely executed by payment, subject to the lien, if any, of an execution creditor for his costs, where there is but one execution in the sheriff's hands, or to the lien, if any, of the creditor for his costs who has the first execution in the sheriff's hands." In order to understand the effect of the enactment it is necessary to have recourse to other sections of the act to see what is meant by the words "an assignment for the general benefit of creditors under this act." The first section enacts that if any person in insolvent circumstances, or knowing himself to be on the eve of insolvency, voluntarily confesses judgment or gives a warrant of attorney to confess judgment, with intent to defeat or delay his creditors or to give any creditor a preference over his other creditors, every such confession or warrant of attorney shall be void as against the creditors of the party giving it. The second section avoids as against the other creditors any gift or assignment of goods or other property made by a person at a time when he is in insolvent circumstances or knows that he is on the eve of insolvency, with intent to defeat, delay, or prejudice his creditors, or give any of them a preference. Then follows section 3, which is important. Its first sub-section provides that nothing in the preceding section shall apply to an assignment made to the sheriff of a county in which the debtor resides or carries on business, or to any assignee resident within the province with the consent of his creditors as thereafter provided for the purpose of paying, rateably and proportionately, and without preference or priority, all the creditors of the debtor their just debts. The second sub-section enacts that every assignment for the general benefit of creditors

which is not void under section 2, but is not made to the sheriff nor to any other person with the prescribed consent of the creditors, shall be void as against a subsequent assignment which is in conformity with the act, and shall be subject in other respects to the provisions of the act until and unless a subsequent assignment is executed in accordance therewith. The fifth sub-section states the nature of the consent of the creditors which is requisite for assignment in the first instance to some person other than the sheriff. These are the only sections to which it is necessary to refer in order to explain the meaning of section 9.

Before discussing the effect of the enactments to which attention has been called, it will be convenient to glance at the course of legislation in relation to this and cognate matters both in this province and in the Dominion. The enactments of the first and second sections of the act of 1887 are to be found, in substance, in sections 18 and 19 of the act of the province of Canada passed in 1858 for the better prevention of fraud. There is a proviso to the latter section which excepts from its operation any assignment made for the purpose of paying all the creditors of the debtor rateably without preference. These provisions were repeated in the Revised Statutes of Ontario, 1887, c. 118. A slight amendment was made by the act of 1884, and it was as thus amended that they were re-enacted in 1887. At the time the statute of 1858 was passed there was no bankruptcy law in force in the province of Canada. In the year 1864 an act respecting insolvency was enacted. It applied in Lower Canada to traders only; in Upper Canada to all persons whether traders or non-traders. It provided that a debtor should be deemed insolvent and his estate should become subject to compulsory liquidation if he committed certain acts similar to those which had for a long period been made acts of bankruptcy in this country. Amongst these acts were the assignment or the procuring of his property to be seized in execution with intent to defeat or delay his creditors, and also a general assignment of his property for the benefit of his creditors otherwise than in manner provided by the statute. A person who was unable to meet his engagements might avoid compulsory liquidation by making an assignment of his estate in the manner provided by that act, but unless he made such an assignment within the time limited the liquidation became compulsory. This act was in operation at the time the British North America act came into force. In 1869 the Dom-

inion Parliament passed an Insolvency act, which proceeded on much the same lines as the provincial act of 1864, but applied to traders only. This act was repealed by a new Insolvency act of 1875, which, after being twice amended, was, together with the amending acts, repealed in 1880. In 1887, the same year in which the act under consideration was passed, the provincial legislature abolished priority among creditors by an execution in the High court and County courts, and provided for the distribution of any moneys levied on an execution rateably amongst all execution creditors and all other creditors who within a month delivered to the sheriff writs and certificates obtained in the manner provided by that act.

Their lordships proceed now to consider the nature of the enactment said to be *ultra vires*. It postpones judgments and executions not completely executed by payment to an assignment for the benefit of creditors under the act. Now, there can be no doubt that the effect given to judgments and executions and the manner and extent to which they may be made available for the recovery of debts are *prima facie* within the legislative powers of the provincial Parliament. Executions are a part of the machinery by which debts are recovered and are subject to regulation by that Parliament. A creditor has no inherent right to have his debt satisfied by means of a levy by the sheriff, or to any priority in respect of such levy. The execution is a mere creature of the law which may determine and regulate the rights to which it gives rise. The act of 1887, which abolished priority as amongst execution creditors, provided a simple means by which every creditor might obtain a share in the distribution of moneys levied under an execution by any particular creditor. The other act of the same year, containing the section which is impeached, goes a step further and gives to all creditors under an assignment for their general benefit a right to a rateable share of the assets of the debtor, including those which have been seized in execution. But it is argued that inasmuch as this assignment contemplates the insolvency of the debtor, and would only be made if he were insolvent, such a provision purports to deal with the insolvency and therefore is a matter exclusively within the jurisdiction of the Dominion Parliament. Now it is to be observed that an assignment for the general benefit of creditors has long been known to the jurisprudence of this country and also of Canada, and has its force and effect at common law

quite independently of any system of bankruptcy or insolvency, or any legislation relating thereto. So far from being regarded as an essential part of the bankruptcy law, such an assignment was made an act of bankruptcy on which an adjudication might be founded, and by the law of the province of Canada which prevailed at the time when the Dominion act was passed, it was one of the grounds for an adjudication of insolvency. It is to be observed that the word "bankruptcy" was apparently not used in Canadian legislation, but the insolvency law of the province of Canada was precisely analogous to what was known in England as the bankruptcy law. Moreover, the operation of an assignment for the benefit of creditors was precisely the same, whether the assignor was or was not in fact insolvent. It was open to any debtor who might deem his solvency doubtful, and who desired in that case that his creditors should be equitably dealt with, to make an assignment for their benefit. The validity of the assignment and its effect would in no way depend on the insolvency of the assignor, and their lordships think it clear that the 9th section would equally apply whether the assignor was or was not insolvent. Stress was laid on the fact that the enactment relates only to an assignment under the act containing the section, and that the act prescribes that the sheriff of the county is to be the assignee unless a majority of the creditors consent to some other assignee being named. This does not appear to their lordships to be material. If the enactment would have been *intra vires*, supposing section 9 had applied to all assignments without these restrictions, it seems difficult to contend that it became *ultra vires*, by reason of them. Moreover, it is to be observed that by sub-section 2 of section 3 assignments for the benefit of creditors not made to the sheriff or to other persons with the prescribed consent, although they are rendered void as against assignments so made, are nevertheless, unless and until so avoided, to be "subject in other respects to the provisions" of the act. At the time the British North America act was passed, bankruptcy and insolvency legislation existed and was based on very similar provisions both in Great Britain and in the province of Canada. Attention has already been drawn to the Canadian act. The English act then in force was that of 1861. That act applied to traders and non-traders alike. Prior to that date the operation of the bankruptcy acts had been confined to traders. The statutes relating to insolvent debtors,

other than traders, had been designed to provide for their release from custody on their making an assignment of the whole of their estate for the benefit of their creditors. It is not necessary to refer in detail to the provisions of the act of 1861. It is enough to say that it provided for a legal adjudication in bankruptcy, with the consequence that the bankrupt was divested of all his property, and its distribution amongst his creditors was provided for. It is not necessary, in their lordships' opinion, nor would it be expedient to attempt to define what is covered by the words "bankruptcy" and "insolvency" in section 91 of the British North America act. But it will be seen that it is a feature common to all the systems of bankruptcy and insolvency to which reference has been made, that the enactments are designed to secure that in the case of an insolvent person his assets shall be rateably distributed amongst his creditors, whether he is willing that they shall be so distributed or not. Although provision may be made for a voluntary assignment as an alternative, it is only as an alternative. In reply to a question put by their lordships the learned counsel for the respondent were unable to point to any scheme of bankruptcy or insolvency legislation which did not involve some power of compulsion by process of law to secure to the creditors the distribution amongst them of the insolvent debtor's estate.

In their lordships' opinion these considerations must be borne in mind when interpreting the words "bankruptcy" and "insolvency" in the British North America act. It appears to their lordships that such provisions as are found in the enactment in question, relating as they do to assignments purely voluntary, do not infringe on the exclusive legislative power conferred upon the Dominion Parliament. They would observe that a system of bankruptcy legislation may frequently require various ancillary provisions for the purpose of preventing the scheme of the act from being defeated. It may be necessary for this purpose to deal with the effect of executions and other matters which would otherwise be within the legislative competence of the provincial legislature. Their lordships do not doubt that it would be open to the Dominion Parliament to deal with such matters as part of a bankruptcy law, and the provincial legislature would doubtless be then precluded from interfering with this legislation, inasmuch as such interference would affect the bankruptcy law of the Dominion Parliament. But it does not follow that

such subjects, as might properly be treated as ancillary to such a law, and therefore within the powers of the Dominion Parliament, are excluded from the legislative authority of the provincial legislature when there is no bankruptcy or insolvency legislation of the Dominion Parliament in existence. Their lordships will, therefore, humbly advise Her Majesty that the decision of the Court of Appeal ought to be reversed, and that the question ought to be answered in the affirmative. The parties will bear their own costs of this appeal.

*Hon. Edward Blake, Q. C., Mr. Haldane, Q. C., and Mr. Bray,* for the appellant.

*Sir Richard Webster, Q. C., and Mr. Carson, Q. C.,* for the respondent.

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#### TRADE-MARKS IN 1893.

The decisions of 1893 which centre on trade-marks and word-marks are thus summarized in *Industries and Iron* :—

*The Singer Case.*—By far the most important case of the year was that in which the Singer Company vindicated their right to the exclusive use of their own name. The action (although brought against an English distributing house) was directed against certain German manufacturers who so made use of the word "Singer's" and "Singer's system" as to induce purchasers to believe that the machines were manufactured by the Singer Company.

*Barber v. Manico* is a case where the plaintiff sued on a trade-mark relating to cutlery. The plaintiff failed on the trade-mark, but succeeded in obtaining an injunction against the defendant restraining the latter from passing off his goods as those of the plaintiff. The injunction was limited to Ireland.

**WORD-MARKS.**—The decisions have been fairly numerous as to word-marks, and leave the law in a state of chaos. We have had to point out more than once that the position of word-marks is in a most unsatisfactory condition. In order to understand the full effect of the following decisions it is well to bear in mind that word-marks are allowable in three cases: (1) If an old mark—i. e. in use before 1875, or (2) an invented word, or (3) a word having no reference to the character or quality of the goods and not being a geographical name.

*Reading Biscuits.*—Messrs. Huntley & Palmer obtained an injunction to restrain some intending competitors from using the name of the town Reading, so as to net the trade of Messrs. Huntley & Palmer. The word "Reading" was not registered as a mark.

*John Bull* was held by the Court of Appeal to be a good mark as applied to beer. (*Paine v. Daniell*.)

*Fruit Salt.*—Mr. Eno obtained an injunction against Messrs. Dunn & Co. to restrain the latter using the following expression: "Dunn's Fruit Salt and Potash Lozenges." (*Eno v. Dunn*.)

*The Great Two D Brand.*—This was a registered mark belonging to Messrs. Leahy. The latter complained of the use by Glover of "The G. and M. 2d. Cigars." The House of Lords held that there was no infringement, and held that the plaintiffs, Messrs. Leahy, could not claim an exclusive right to the expression "Two D." (*Leahy v. Glover*.)

*Carnival* held not to be a good mark on the ground that it was descriptive as applied to cigarettes. The mark was accordingly expunged. (*Lloyd & Sons' Trade-Mark*.)

*Ancross.*—This word was refused registration on the ground that it was calculated to deceive, an anchor being common to the trade for the class of goods for which the word "Ancross" was sought to be registered. (*Thewlis & Blakey's Trade-Mark*.)

*Red Star Brand.*—This mark was expunged from the register, as being likely to be mistaken for a trade-mark, being the device of a star. (*La Société Anonyme des Verreries de l'Etoile Trade-Mark*.)

*Yorkshire Relish.*—These words were registered as an old mark. The user proved before 1875 was that the term "Yorkshire Relish" was stencilled on packing cases. This was held not to be a use as a trade-mark, and the mark was accordingly removed from the register. (*Powell's Trade-Mark*.) This decision compels Messrs. Powell, Goodall & Co. to rely on their common law rights, and not to rely on the Trade-Mark Act at all. If this case stood alone, it would justify our contention that words as trade-marks are in a most unsatisfactory condition.

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#### LIBELS ON TRADING COMPANIES.

A corporation, it has often been said, has neither a soul to be saved nor a body to be kicked, and one of the logical consequences

of its impersonal character is that it cannot recover those damages in respect of a defamatory statement which would be awarded to an individual as a *solutum* for his injured feelings; for a corporate body has no feelings capable of being injured. It also follows from the nature of a corporation that there are peculiar kinds of libel which cannot affect it. "A corporation," said Chief Baron Pollock, in *The Metropolitan Saloon Omnibus Company v. Hawkins*, 28 Law J. Rep. Exch. 201, "could not sue in respect of an imputation of murder, or incest, or adultery, because it could not commit those crimes. Nor could it sue in respect of a charge of corruption, for a corporation cannot be guilty of corruption." It was on this ground that a Divisional Court held three years ago that an action for libel was not maintainable which the Manchester Corporation had brought against a person who stated that bribery and corruption existed in some departments of the city council (*The Mayor, &c., of Manchester v. Williams*, 60 Law J. Rep. Q. B. 23). In respect, however, of a libel by which the property of a corporation is injured, the Court of Exchequer held, in *The Metropolitan Saloon Omnibus Company v. Hawkins* that an action lies at common law. Whether, also, a trading company can recover damages for a libel reflecting upon it in the conduct of its business without alleging and proving actual injury to its property or trade—i. e. whether it is sufficient that the libel should be one calculated to injure the company in its business—is an important question which was answered in the affirmative on November 28 by the Court of Appeal in *The South Hetton Colliery Company (Lim.) v. The North-Eastern News Association (Lim.)*. The plaintiffs in that case were the proprietors of a colliery in Durham, and, as is usual in that county, provided free cottages for the miners in their employment as part of their wages. The defendants published an article in a local newspaper in which the plaintiffs' colliery village was described as being in a terribly insanitary condition. This article the plaintiffs alleged to be a reflection on them in the management of their business as colliery proprietors; they did not allege or attempt to prove that they had suffered damage, but the jury found that the article was defamatory and awarded £25 damages. In the Court of Appeal the defendants contended that as the gist of an action for defamation is the injury to character, a corporation, having no character in the ordinary sense of the term, cannot sue for a libel, though it may bring an action in the nature of an action on the case for a

false and malicious statement which has caused injury to its property or trade. It had to be conceded that partners in a business who have been libelled in respect of their trade can maintain a joint action without alleging special damage. There is ample authority on this point, and it has also been held that a joint stock insurance company which by its constitution was not a corporation, but a partnership, could bring an action for a libel reflecting on the company in the conduct of its business (*Williams v. Beaumont*, 10 Bing. 260). The defendants, therefore, attempted to distinguish the present action from a joint action by partners, on the ground that a trade libel on a partnership is necessarily a reflection on the capacity or integrity of the members, and thus affects their personal character; but an attack on a company contains no imputation on the individual shareholders, as, unlike partners, they can exercise no control on the conduct of the company's business. This ingenious distinction, however, did not commend itself to the Court. They said that the law of libel is the same for all plaintiffs, whether individuals, firms, or companies. The question is always whether what was said would have the effect of making people think of the plaintiffs with hatred, ridicule, or contempt. Some things could not possibly have this effect in the minds of reasonable persons when spoken of a corporation, and in respect of such things the corporation could not maintain an action. But a trading company has a trade character which may be injured or ruined, and therefore an action will lie for any libel reflecting on its conduct in its business; and the law of libel being the same for all plaintiffs, it follows that special damage need never be proved. The damages are at large, and the jury can award such as they think fit, having regard to all the circumstances.

There are several reasons for which this decision will commend itself to the good sense of the community. It may be of the utmost importance to a trading company that it should be able to counteract at once the effects of a libel reflecting on the conduct of its business. If it must wait until damage has accrued, the action may have to be deferred until irreparable mischief has resulted. Again, damage may ensue which it would be difficult or impossible to prove to be the consequence of the libel. The expansion of a business might, for instance, be checked or prevented, although the injury could, perhaps, not be proved by any evidence on which a jury could act. There is, moreover, a rea-

sonable presumption that an imputation of misconduct in business causes damage, and it is on this ground that, when the defamatory statement is verbal, an exception is made to the general rule that in actions of slander, as distinguished from actions of libel, it is necessary to prove damage.—*Law Journal (London)*.

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### PRISONS AND CRIMINAL TREATMENT.

In a lecture at the London Institute, Mr. William Tallack, Secretary of the Howard Association, said the history of criminal treatment resembled a very long track, continued for most of its course through dense fogs and clouds, but with some bright rays shining upon it in the far away ages of the ancient Jews and the early Welsh and British, and again emerging into comparative light in our own times. In England, of all countries, an injured person had to incur much expense and trouble in order to prosecute those who had robbed or wronged him; and even when he had secured their imprisonment or fine, there was no thought of compensating him. At the very least, the law ought to undertake the trouble and all the cost of prosecutions, by some such arrangement as the appointment in every district of officers like the Scotch Procurators Fiscal. It was a national scandal that, for example, Mr. Labouchere's public-spirited endeavours to expose most mischievous villanies should cost him thousands of pounds as a private individual, instead of such matters being promptly taken up and carried through at the national cost. In the last century a boy named John Scott was charged with trespassing and stealing apples. The magistrates, instead of punishing him, ordered his father to make restitution to the injured party. This was done, but Mr. Scott took much better care of his son in future, and the lad ultimately became Lord Chancellor Eldon. Mr. Tallack thought that a vast amount of juvenile crime would be effectually and cheaply prevented if the responsibilities of many of the parents of the twenty thousand youths in Reformatory and Industrial Schools were more strictly enforced by compelling their payment, to a far great extent than at present, towards the support of these children, and as some compensation to the now injured taxpayer. After speaking of the terrible state of British prisons long after Howard's days, the lecturer said about the year 1830 several countries, more particularly the United States, had sought a remedy for these evils by the rigid solitary system.

They constructed underground cells and shut up unfortunate offenders in them, without light, without work, without books, and without instruction. Of course death and suicide resulted to many of the victims. And then a revulsion against all, even necessary, prison separation took place in the popular mind, which had continued in America to this day, and which was increased by Charles Dickens's absurd fictions in his "American Notes." The special prisoner for whom Dickens's "heart bled" (who had previously incited to a riot in an association prison) lived 42 years afterwards, surviving the novelist fourteen years, and finally he came back voluntarily to the same Philadelphia "separate" (not solitary) prison, begging to be allowed to finish his life there, as in an asylum, amongst his old friends, the officers. This strange request was granted. Belgium and Great Britain had adopted the "separate" as distinguished from the rigidly "solitary" system, at least in a great degree, and for most of the ordinary offenders, and with excellent results. Such separation was or always should be merely from evil companionship. Chaplains, schoolmasters, warders, magistrates, and others often visited the prisoner, whose hands were occupied with industry; he had exercise books, and could earn various privileges by good behaviour. Such separation facilitated reflection and religious instruction. It prevented riots and escapes. It baffled contagious epidemics. It afforded opportunities for modes of labour which (unlike the prison workshops with machinery) interfered as little as possible with outside industry. Although even the prisoner had an inalienable right of individual labour-competition to a moderate extent, and although this "separate system" was costly at first, it was ultimately most economical both by its diminution of crime, and by its enabling shorter sentences to be substituted, with more, both of reformation and deterrence, instead of long periods of associated criminal detention. It should not in general extend over more than a year or two at the utmost. But with these limits and common care excellent health was usually maintained. All first-committed prisoners should be placed in gaols containing no re-convicted criminals. More visitation of prisoners by suitable persons (especially of female prisoners by ladies) was desirable. All imprisonments of young children should be abolished. Every beggar and vagrant should be dealt with either for relief or detention. Procurators Fiscal, or district public prosecutors, should be appointed throughout England and Wales.

# THE LEGAL NEWS.

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VOL. XVII.

APRIL 1st, 1894.

No. 7.

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## SUPREME COURT OF CANADA.

OTTAWA, February 20, 1894.

Quebec.]

**HARBOUR COMMISSIONERS OF MONTREAL v. GUARANTEE Co. OF  
NORTH AMERICA.**

*Insurance—Guarantee—Notice to insurer of defalcation—Diligence.*

By the conditions of a guarantee policy insuring the honesty of W., an employee, it was stipulated that the policies were granted upon the express conditions (1) that the answers contained in the application contained a true statement of the manner in which the business was conducted and accounts kept, and that they would be so kept, and (2) that the employers should immediately upon its becoming known to them, give notice to the guarantors that the employee had become guilty of any criminal offence entailing or likely to entail loss to the employers and for which a claim was liable to be made under the policy. There was a defalcation in W's accounts, no supervision was exercised over W's books as represented they would, and when the guarantors were notified over a week after employers had full knowledge of the defalcation, W. had left the country.

*Held*, affirming the judgment of the court below, (R.J.Q., 2 B. R. 6) that as the employers had not exercised the stipulated supervision over W., and had not given immediate notice of the defalcation they were not entitled to recover under the policy.

Appeal dismissed with costs.

*H. Abbott, Q.C.*, for appellant.

*Cross, Q.C., & Geoffrion, Q.C.*, for respondent.

February 20, 1894.

## HOLLIDAY v. HOGAN.

Ontario.]

*Surety—Discharge of—Endorser of note—Release of maker—Reservation of rights.*

The plaintiff H., and the defendants J. & H., were both creditors of the other defendant, a hotel-keeper. The debtor borrowed \$600 from H., giving a note endorsed by J. & H., who also assigned to H. to the extent of \$600 a chattel mortgage on the debtor's property. The debtor not being able to pay the claim against him sold out his business to a third party who was accepted by both creditors as their debtor, and an agreement was entered into between the plaintiff and the new debtor by which time was given to the latter to pay his debt, but in all the negotiations that took place no mention was made of the \$600 note. An action was brought against both maker and indorser of said note, which, on the trial, was dismissed as against the indorser, the trial judge holding that plaintiff had reserved his rights as against the indorser. This decision against the indorser was affirmed by a Divisional Court (22 O.R. 235), but reversed by the Court of Appeal (20 Ont. App. R. 298).

*Held*, affirming the judgment of the Court of Appeal, that the indorser was relieved from liability by the release of the maker.

Appeal dismissed with costs.

*Johnson, Q. C.*, for appellant.

*Moss, Q. C.*, for the respondent.

February 20, 1894.

## GRAND TRUNK RY. CO. v. BEAVER.

Ontario.]

*Railway Company—Purchase of ticket by passenger—Refusal to deliver to conductor—Ejection from train—Contract between passenger and company—Railway Act, 51 Vic. c. 29, s. 248 (D).*

By Sec. 248 of the Railway Act (51 Vic. c. 29, s. 248 (D)) any person travelling on a railway who refuses to pay his fare to a conductor on demand may be put off the train. B. purchased a ticket to travel on the G. T. Ry., from Caledonia to Detroit, but had mislaid it when the conductor took up the fares, and was put off the train for refusal to pay the fare in money or produce the ticket.

*Held*, reversing the decision of the Court of Appeal (20 Ont. App. R. 476) which affirmed the judgment of the Divisional Court (22 O. R. 667), that the contract between the purchaser of a railway ticket and the company implies that the ticket will be delivered up when demanded by the conductor, and that B. could not maintain an action for being ejected on refusal to so deliver.

Appeal allowed with costs.

*McCarthy, Q. C. & Nesbitt* for the appellants.

*Du Vernet* for the respondent.

February 20, 1894.

NORTHOOTE v. VIGMON.

Ontario.]

*Specific performance—Agreement to convey land—Defect of title—Will—Devise of fee with restriction against selling—Special legislation—Compliance with provisions of.*

Land was devised to N., with a provision in the will that he should not sell or mortgage it during his life, but might devise it to his children. N. agreed, in writing, to sell the land to V., who, not being satisfied of N's power to give a good title, petitioned, under the Vendors and Purchasers Act, for a declaration of the Court thereon. The Court held that the will gave N. the land in fee with a valid restriction against selling. N. then asked V. to wait until he could apply for special legislation to enable him to sell, to which V. agreed and thenceforth paid to N. interest on the proposed purchase money. N. applied for a special act which was passed giving him power notwithstanding the restriction in the will to sell the land, and directing that the purchase money should be paid to a trust company. Prior to the passing of this act, N., in order to obtain a loan on the land, had leased it to a third party and the lease was mortgaged, and N. afterwards assigned his reversion in the land.

In an action by V. for specific performance of the contract to sell the land defendant claimed that the contract was at an end when the judgment on the petition was given; that he could give no title under the will; and that if performance were decreed the amount received on the sale of the land should be paid to him, and only the balance to the trust company.

*Held*, affirming the decision of the Court of Appeal, that the contract was kept alive by N., after the judgment as to title; that V. was entitled to her decree for performance; and that

the whole purchase money must be paid to the trust company.

*Marsh, Q.C.*, and *Roaf* for the appellants.

*McPherson* and *Clarke* for the respondents.

February 20, 1894.

CLARKE v. HAGAR.

Ontario.]

*Contract—Illegal or immoral consideration—Transfer of property—Intention of transferor—Knowledge of intended use—Pleading.*

H. sold a house to a person who had occupied it as a house of ill-fame, taking a mortgage for part of the purchase money. The equity of redemption was assigned to C., and to an action of foreclosure C. set up the defence that the price paid for the house was in excess of its value, and a part of it was for the good will of the premises as a brothel. On the trial it was found as a fact that H., when selling, knew the character of the buyer and the kind of place she had been keeping, but that the house was not sold for the purpose of being used as a place of prostitution. Judgment was given against C. in all the Courts below.

*Held*, affirming the decision of the Court of Appeal, Taschereau, J., dissenting, that the particular facts relied on as constituting the illegal or the immoral consideration should have been set out in the statement of defence; that if the house had been sold by H. with the intention that it should be used for an immoral or illegal purpose, the contract of sale would have been void and incapable of being enforced, but mere knowledge by C. of the buyer's intention so to use it would not avoid the contract.

Appeal dismissed with costs.

*R. Clarke*, appellant, in person.

*Armour, Q.C.*, for the respondent.

February 20, 1894.

FARWELL v. THE QUEEN.

Exchequer.]

*Information of intrusion—Subsequent action—Res Judicata—Jurisdiction of the Exchequer Court—B.N.A. Act, Sec. 101.*

In a former action by information of intrusion to recover possession of land in British Columbia, the title to such land was directly in issue and determined (See 14 Can. S.C.R. 392).

On an information of the Attorney General for the Dominion of Canada, praying for an order of the Court directing the defendant to execute to the Queen in right of Canada, a surrender or conveyance of the same land, the defendant in answer to the information, set up the provincial grant relied on in the first action, and contended further, that the Parliament of Canada had no power to give to the Exchequer Court original jurisdiction.

*Held*, affirming the judgment of the Court below, that there was *res judicata* as to the title sought to be relied on by defendant. *Atty. Gen. of British Columbia v. Atty. Gen. of Canada* (14 App. Cas. 295) distinguished.

*Held*, also, that the Parliament of Canada had power to give jurisdiction to the Exchequer Court of Canada in all actions and suits of a civil nature at common law or equity in which the Crown in right of the Dominion, is plaintiff or defendant. B.N. A. Act, sec. 101. *Taschereau, J., dubitante.*

Appeal dismissed with costs.

*D. McCarthy, Q.C.*, for appellant.

*Hogg, Q.C.*, for respondent.

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February 20, 1894.

#### THE QUEEN v. DEMERS.

Exchequer.]

*Title to lands in railway belt in British Columbia—Unsurveyed lands held under pre-emption record prior to statutory conveyance to Dominion Government—Federal and provincial rights—British Columbia Lands Acts of 1873 and 1879—47 Vic. ch. 6 (D).*

On 10th Sept., 1883, *D. et al.*, obtained a certificate of pre-emption under the B.C. Land Act 1875, and Land Amendment Act 1879, of 640 acres of unsurveyed lands within the 20 mile belt south of the C.P.R., reserved on the 29th Nov., 1883, under an agreement between the Governments of the Dominion and of the Province of British Columbia, and which was ratified by 47 Vic. c. 14 (B.C.) On 29th August, 1885, this certificate was cancelled, and on the same day a like certificate was issued to respondents, and on the 31st July, 1889, letters patent under the Great Seal of British Columbia were issued to respondent. By the agreement ratified by 47 Vic. c. 6 (D) it was also agreed

that three and a half millions additional acres in Peace River District should be conveyed to the Dominion Government in satisfaction of the right of the Dominion under the terms of union to have made good to it, from public lands contiguous to the railway belt, the quantity of land that might at the date of the conveyance be held under pre-emption right or by Crown grant.

On an information by the Attorney General for Canada to recover possession of the 640 acres:

*Held*, affirming the judgment of the Exchequer Court, that the land in question was exempt from the statutory conveyance to the Dominion Government, and that upon the pre-emption right granted to D., *et al.*, being subsequently abandoned or cancelled, the land became the property of the Crown in right of the province, and not in the right of the Dominion.

Appeal dismissed with costs.

*Hogg, Q. C.*, for appellant.

*McCarthy, Q. C.*, for respondents.

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February 20, 1894.

OSCAR AND HATTIE V. THE QUEEN.

[British Columbia.]

54-55 Vic. (U. K.) c. 19, sec. 1, subsec. 5—*Presence of a British Ship equipped for sealing in Behring Sea—Onus probandi—Lawful intention.*

On 30th August, 1891, the ship "Oscar and Hattie," a fully equipped sealer, was seized in Gotzleb Harbour, in Behring Sea, while taking in a supply of water.

*Held*, affirming the judgment of the Court below, that when a British ship is found in the prohibited waters of Behring Sea, the burthen of proof is upon the owner or master to rebut by positive evidence that the vessel is not there used or employed in contravention of the Seal Fishery Behring Sea Act, 1891, 54-55 Vic. c. 19, sec. 1, subsec. 5.

*Held* also, reversing the judgment of the Court below, that there was positive and clear evidence that the Oscar and Hattie had entered the prohibited waters at Gotzleb Harbour for the sole purpose of getting a supply of water on her return trip from Copper Island to Vancouver Island, and that she was not used or

employed at the time of her seizure in contravention to 54-54 Vic. ch. 19, sec. 1, subsec. 5.

Appeal allowed with costs.

*McCarthy, Q.C., & Eberts, Q.C.*, for appellants.

*Hogg, Q.C.*, for respondent.

February 20, 1894.

THE CORPORATION OF THE CITY OF VANCOUVER v. THE CANADIAN  
PACIFIC RAILWAY COMPANY.

[British Columbia.]

44 Vic. c. 1, sec. 18—*Powers of Canadian Pacific R'y Co. to take and use foreshore—B. C. Statutes, 1886, 49 Vic. c. 32, City of Vancouver—Right to extend streets to deep water—Crossing of railway—Jus publicum—Interference with—Injunction.*

By section 18, 44 Vic., c. 1, the Canadian Pacific Railway Co. "have the right to take, use and hold the beach and land below high water mark, in any stream, lake, navigable water, gulf or sea, in so far as the same shall be vested in the Crown, and shall not be required by the Crown to such extent as shall be required by the Company for its railway and other works as shall be exhibited by a map or plan thereof deposited in the office of the Minister of Railways."

By 51 Vic., c. 6, sec. 5, the location of the Company's line of railway on the foreshore of Burrard Inlet, at the foot of Gore Avenue, Vancouver City, was ratified and confirmed.

The Act of Incorporation of the City of Vancouver, vests in the city all streets, highways &c., and in 1892, the city began the construction of works extending from the foot of Gore Avenue, with the avowed object to cross the railroad track at a level and obtain access to the harbour at deep water.

On an application for an injunction to restrain the city corporation from proceeding with their work of construction and crossing the railway:

*Held*, affirming the judgment of the Court below, that the *jus publicum* of every riparian owner to get access to and from the water at his land, is subordinate to the rights given to the railroad company by statute on the foreshore in question, and therefore the injunction was properly granted.

Per KING, J.—When any public right of navigation is interfered with, it should be maintained and protected by the Attorney General for the Crown.

Appeal dismissed with costs.

*D. McCarthy, Q.C., & Mr. Hammersley* for appellant.

*Robinson, Q.C.*, for respondent.

*THE LATE MR. JUSTICE STEPHEN.*

It is with deep regret that we record the death of Sir James Stephen, which took place on Sunday, March 11, at Redhouse Park, Ipswich. His health had been in a serious state for several months, and he had left his residence in De Vere Gardens, Kensington, and taken up his quarters in the country in the hope that the change of air and scene would improve his condition; but no favourable result followed, and he gradually succumbed to the illness which led to his retirement from the Bench nearly three years ago. He died at the age of sixty-five, after a life of arduous toil such as few men have been able to live. He came of a family of hard-workers, some of whom were distinguished as well as industrious. His grandfather, Mr. James Stephen, was a well-known Master in Chancery, and played a leading part in the anti-slavery movement, while his father, Sir James Stephen, was for a time Under Secretary of the Colonies, and was the author of 'Essays in Ecclesiastical Biography.' His only brother is Mr. Leslie Stephen, the eminent *littérateur*. Born at Kensington Gore on March 3, 1829, he was educated at Trinity College, Cambridge, where he graduated in 1852. The early part of his career, either at Cambridge or in the Temple, gave no indication of the eminence which belonged to his later years. He did not distinguish himself as a scholar at his University, and his rise at the Bar—to which he was called at the Inner Temple in 1854—was far from rapid. His qualities were not those of the advocate. His speeches were always models of lucidity; but his delivery was ponderous, and the accuracy of his views was not accompanied by rapidity of judgment. Five years after his call, however, he was appointed Recorder of Newark-on-Trent, and he obtained a moderate practice on circuit and at sessions. The first case to bring his name prominently before the public and the profession was the prosecution of the Rev. Roland Williams in the Court of Arches on a charge of heresy preferred against him by the Bishop of Salisbury. In this defence he obtained his first opportunity of displaying those extraordinary powers of research for which subsequently he became famous. The reputation he acquired in this ecclesiastical trial was strengthened by the part he played as one of the prosecuting counsel in the case of Governor Eyre. But it was in the fields of journalism and literature that his best work was done, during the fifteen years that elapsed between his call to

the Bar and his appointment as legal member of the Council of the Governor-General of India. He was a regular contributor to the *Saturday Review* and the *Cornhill Magazine*, and to several other of the leading periodicals of the day, the whole of his contributions being marked by a thoroughness of thought and lucidity of phrase which rendered them very acceptable reading even to those who did not share the conclusions at which he arrived. He was one of the earliest and most valued contributors to the *Pall Mall Gazette*. It is related that on many an occasion the editor would receive two articles on topical subjects from his pen before ten o'clock in the morning, and that their argumentative power and phraseology would not be inferior to his more studied contributions to the reviews. A number of his essays were gathered into a volume and published under the title of 'Essays by a Barrister.' His chief work of legal interest before he went to India was 'A General View of the Criminal Law,' which was published in 1863. It was in 1869 that he was appointed to succeed Sir Henry Maine as Legal Member of the Council of the Governor-General of India, and he remained in India some three years, during which his labors as a law reformer were sufficient to secure for his name an enduring place in the annals of the country. His activity knew no bounds, and doubtless the severe strain he imposed upon his mental and physical powers at this time was not unconnected with the sorrowful events that preceded the comparatively early death which every member of the legal profession now deploras. Taking up the work of codification begun by his predecessors, he prepared and passed through the council a code of criminal procedure and the Indian Evidence Act, 1872, both of which, though not beyond criticism in several respects, conferred lasting benefits upon the country, and in the preparation and passing of which Sir James Fitzjames Stephen exerted all the strength of which his massive frame and mind were capable. Having achieved such great success in his work of codification in India, he devoted himself to somewhat similar tasks in England on his return in 1872. At the instance of Lord Coleridge, then Attorney-General, he drafted a bill codifying the English law of evidence, and later on he prepared a bill for the codification of criminal law; but neither of his efforts, though each had involved an enormous amount of labor, met with success. The latter bill was submitted to a select committee, consisting of Lord Blackburn, Lord Justice

Lush, and Mr. Justice Barry, and a report was published; but, despite many promises that the matter should be dealt with in Parliament, the Government allowed it to disappear from their programme. Henceforward, until his promotion to the Bench, his time was chiefly occupied with literary labours. He resumed with renewed energy his contributions to newspapers and magazines, and increased his reputation as an author by 'Liberty, Equality, and Fraternity,' a powerfully-reasoned reply to Mill's 'Liberty.' He was appointed to the Bench in 1879; but his literary labours did not cease with his promotion. Some of his most important works were written as relaxation from his judicial duties. Among them are his 'History of the Criminal Law of England' and his 'Digest of the Law of Criminal Procedure.' His letters to the *Times* on Mr. Gladstone's Home Rule Bill of 1886 will be remembered for the masterly manner in which he presented his case against that measure, though whether a judge should have entered the political arena is a matter which certainly admits of some doubt. He was far more successful in writing upon political subjects than he was in attempting to enter the House of Commons. He made two fruitless efforts in this direction—one at Harwich in 1865, the other at Dundee in 1873. It must not be supposed, however, that the literary interests of the distinguished jurist were confined to legal, political, and philosophic questions. He was a great novel reader, though he did on one occasion, while trying a theatrical case, attribute the authorship of 'East Lynne' to Miss Braddon. He was thoroughly familiar with all the standard novelists of England and France, his favourite works of fiction being those of Victor Hugo, upon which he was ever ready to discourse. Among the lighter works from his own pen may be mentioned published addresses on 'The Right Use of Books,' 'The Relation of Novels to Life,' and 'Desultory and Systematic Reading.' He occupied a seat on the Bench for twelve years, during which period he was distinguished, both in civil and criminal trials, for the conscientiousness with which he discharged his duties, and for the profound learning which marked his judgments. He retired in April, 1891, in consequence of certain statements that were made regarding his health. He bade the Bar 'good-bye' in the Lord Chief Justice's Court, which was crowded with members of both branches of the profession eager to witness his last appearance on the Bench, and

to hear his pathetic words of farewell. In recognition of his eminent services he was created a baronet. He is succeeded in the baronetcy by Mr. Herbert Stephen, who was called to the Bar at the Inner Temple in 1881, and is clerk of assize on the Northern Circuit.—*Law Journal (London)*.

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### MARRIAGE FOR A LIMITED TIME.

An interesting, yet extremely ridiculous, question has found its way into the California Courts. The problem to be solved in all seriousness by the Courts is this: 'Is a marriage on the European plan valid?' In other words, is a contract of marriage stipulated to expire at the end of six months or a year a valid document? If the document be valid, is the limitation good? Does the limitation invalidate the contract? Can the relations of the contracting parties be legally set aside at the end of the prescribed time? Would a child born after the limit has expired, and were the contract not renewed, be a legitimate child? It seems impossible that in this day such a question should be seriously raised; but, as a matter of fact, there has developed among the California lawyers some difference of opinion on the subject.

Six months ago Edward M. Elkus and Lillie Mabney, of San Francisco, entered into a contract 'to be married for a period of six months.' A few days ago they again repaired to a notary's office, and caused a second contract to be drawn up for another six months. The young couple maintained that they have the advice of good lawyers that the contract is good. The situation is such a novel one that several reputable lawyers have persuaded the young couple to permit the question to be submitted to a court of adjudication. Just how to get this before the court is the question. It can hardly be accomplished by divorce proceedings, neither could it be accomplished by criminal process. Lawyers, however, declare that they will find a way of bringing the matter to judicial notice, in order that the ridiculous proposition may be settled at once.

Some of the best lawyers in the State have taken an interest in the matter. Many prominent citizens declare that it is against public policy for such a question to be dignified by a doubt for any length of time. On the other hand, there are a few lawyers who consent to maintain the strict legality of the terms of the limited contract.

What must undoubtedly be the law on the subject was expounded by Henry S. Foster, one of the lawyers interested. Mr. Foster says :—' In the first place, the law in this State is never to dissolve a marriage agreement when to do such would be against the public policy. Surely no one will contend that it would be good policy for the State to permit limited marriages. " Once married, always married " is a good maxim. If the contracting parties have assumed marital relations, they are man and wife, though the contract read " for a day." The only question is, to my mind : Did the parties assume, willingly and honestly, the positions of husband and wife toward each other ? The limitation clause is simply null.'— *Omaha World-Herald*.

#### ONTARIO DECISIONS.

*Negligence—Injury to buyer in shop—Invitation—Child of tender years—Accident—Active interference—Contributory negligence.*

A woman went with a child two and a half years old to defendants' shop to buy clothing for both. While there, a mirror fell on the child and injured him.

*Held*, in an action for negligence, that it was a question for the jury whether the mirror fell without any active interference on the child's part or not; if it fell without such interference, that in itself was evidence of negligence; but if it fell by reason of such interference, the question for the jury would be whether the defendants were guilty of negligence in having the mirror so insecurely placed that it could be overturned by a child; and if that question were answered in the affirmative, the child, having come upon the defendants' premises by their invitation and for their benefit, would not be debarred from recovering by reason of his having directly brought the injury on himself.

*Hughes v. Macfie*, 2 H. and C. 744; *Mangan v. Atherton*, 4 H. and C. 388; and *Bailey v. Neal*, 5 Times L. R. 20, commented on and distinguished.

*Semble*, that the doctrine of contributory negligence is not applicable to a child of tender years.

*Gardner v. Grace*, 1 F. and F. 359, followed.

*Semble*, also, that if the mother was not taking reasonably proper care of the child at the time of the accident, her negligence in this respect would not prevent the recovery by the child.—*Sangster v. Eaton*, Queen's Bench division, March 3, 1894.

*Arbitration and award—Interest of arbitrator—Employment as counsel—Bias—Disqualification.*

Upon a motion to set aside an award of two out of three arbitrators, it was objected that one of the two, a Queen's Counsel, was disqualified by reason of interest. It appeared that, for some years prior to the arbitration, he had from time to time acted as chamber counsel for the standing solicitor of a corporation, one of the parties to the arbitration, and had advised him with respect to matters affecting the corporation. It did not appear that he was the standing counsel for the corporation, nor for the solicitor in matters affecting the corporation, nor that he had advised or acted for the corporation or the solicitor after his appointment as arbitrator, nor that there was any business connection between him and the corporation.

*Held*, that there was no such relation between him and the corporation as might give rise to bias or show an interest which would invalidate the award.

*Vineberg v. Guardian Fire and Life Assurance Co.*, 19 A. R. 293, distinguished.—*In re Christie and Town of Toronto Junction*. Rose, J., Jan. 29, 1894.

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*Partnership—Promissory note—Action against indorser—Action against same person, as maker—Res judicata—Judgment against firm—Action upon judgment against members—Conduct—Election—Estoppel.*

The defendant was sued by the same plaintiffs in a former action as indorser of a promissory note, and judgment was entered in his favor upon the defence that he endorsed it for the accommodation of the plaintiffs without consideration. In this action he was sued upon the same note and others, as a partner in the firm who were the makers of the notes, along with the other partner.

*Held*, that the fact of his establishing his defence in the former action had no effect upon the question of his liability in this. Nor were the plaintiffs debarred by the recovery of a judgment against the partnership from bringing an action upon the judgment against the individual members of it.

*Clarke v. Cullen*, 9 Q. B. D. 355, followed.

The defendant set up that the plaintiffs had elected to treat the other member of the firm as their sole debtor, by reason of

their having proved their claim with and purchased the assets of the partnership from the assignee thereof under an assignment for the benefit of creditors, in which it was recited that the other was the only person composing the firm, and that the defendant had relied and acted upon their conduct and election, and they were therefore estopped from suing him as a partner.

*Held*, that, even if there was evidence that the defendant had acted in any way by reason of the plaintiffs' action, no estoppel arose, because the plaintiffs did nothing showing an election not to look to him, and he had no right to assume an election from what they did, nor to act as if such an election had been made. *Ray v. Isbister*, Street, J., Jan. 4, 1894.

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*Trespass—Arrest and imprisonment before indorsement of warrant—  
Detention—Subsequent indorsement—Damages—Measure of.*

A warrant for the arrest of the plaintiff, who had made default in paying a fine under a summary conviction for an offence against the Liquor License Act, was sent from the county of Oxford to be executed in the city of Toronto. The plaintiff was arrested and imprisoned, professedly under the warrant, by peace officers of the city of Toronto, before it was indorsed by a magistrate for the city. Some hours after the arrest the warrant was indorsed. In an action for trespass, false arrest, etc., *MacMahon, J.*, charged the jury that the only damages they could take into consideration were for the time between the arrest and the indorsement of the warrant, and that the subsequent detention was legal.

*Held*, that the officers who arrested the plaintiff were liable in trespass down to the time when the warrant was indorsed, and the damages were rightly limited according to the charge. *Southwick v. Hare*, Chancery division, Feb. 15, 1894.

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*Negligence—Landlord and tenant—Fall of verandah—Injury to  
daughter of lessee—Covenant to repair.*

Where one had leased premises and had covenanted with the lessor to keep them in repair, and his daughter, living with him

at the time of the accident, was injured by the fall of a verandah attached to the building :—

*Held*, that the daughter had no right of action for damages, on account of the accident, against the lessor, nor could she be considered as standing in the position of a stranger. *Mehr v. McNab*, Chancery division, Feb. 22, 1894.

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*Principal and surety—Extension of time—Renewal of promissory note by some of the sureties—Payment—Right to contribution.*

Three out of four sureties on a promissory note obtained from the holder an extension of time by a renewal during the absence and without the consent or approval of the fourth surety, the holder retaining the original note.

After payment of the renewal by the three who had obtained the extension, they brought an action against the fourth for contribution.

*Held*, that they could not recover.—*Worthington v. Peck*, Ferguson, J., Jan. 26, 1894.

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*Practising medicine—"Apothecary"—R. S. Q. c. 148, s. 45—  
R. S. O. c. 151—Summary conviction.*

A person went into a druggist's shop, and stating he was ill, described his complaint, which the druggist said he understood to be diarrhoea. The druggist told him to live on milk diet, and gave him a bottle of medicine, for which he charged fifty cents. The druggist said he had several kinds of diarrhoea mixture, and sometimes had to inquire in order to decide what mixture to give.

*Held*, that this was practising medicine for gain within s. 45 of the Medical Act, R. S. O. c. 148.

*Held*, also, that the fact of the druggist being registered under the Pharmacy Act, R. S. O. c. 151, which entitled him to act as an apothecary as well as a druggist, did not authorize the practising of medicine.

Rule nisi to quash summary conviction discharged.—*Regina v. Howarth*, in Banc, Feb. 10, 1894.

*Recognizance—Sufficiency of—Motion for certiorari—  
Criminal Code s. 892.*

Where a recognizance filed on a motion for a *certiorari* to remove a conviction did not negative the fact of the sureties being sureties in any other matter, and omitted to state that the sureties were worth \$100 over and above any amount for which they might be liable as sureties, it was held insufficient.

The rule in force as to recognizances prior to the passing of the Criminal Code, is still in force, and therefore there is no necessity for passing a rule under s. 892 of the code.—*Regina v. Robinet*, do., Feb. 12, 1894.

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CHANCERY DIVISION.

LONDON, March 13, 1894.

*Before* NORTH, J.

*In re* ALDRIDGE.—ALDRIDGE v. ALDRIDGE.

*Partnership—Death of partner—Business carried on by surviving partner at a loss—Remuneration for services.*

This was a summons by the executors and trustees of a testator against his brother and the beneficiaries under his will, raising (amongst others) the question whether the brother was entitled to remuneration for his services in carrying on the business of the partnership after the death of the testator.

The brother, the surviving partner, had for nearly two years after the testator's death carried on the business, with the concurrence of the executors, with a view to its being sold as a going concern. Ultimately the brother withdrew from the business premises, and the executors realised the assets; but the sum realised was not sufficient to pay the capital due to the testator.

The brother had no capital of his own in the business.

He claimed remuneration for his services in carrying on the business after the death of the testator. The business had been carried on at a loss.

NORTH, J., held that, as the business had been carried on at a loss, the surviving partner was not entitled to any remuneration for his services.

# THE LEGAL NEWS.

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VOL. XVII.

APRIL 16th, 1894.

No. 8.

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## *CURRENT TOPICS AND CASES.*

The "confessions of a chief justice," which will be found in the present issue, are an interesting leaf from the past, but we cannot recommend our younger readers to follow Mr. Scott's resolutions without some reserve. The day is past, indeed, when students are disposed to rise at four, for preparation for the day's tasks. Early rising was more characteristic of the last century than of the present, and except in the case of those blessed with an unusually vigorous constitution the result would probably be injurious rather than beneficial. In maturer years a man may put greater constraint upon himself without hurt, especially if the strain be followed by judicious relaxation. Mr. Scott, it will be observed, proposed at first to follow this regimen for five years only, and then to retire from practice. He fails to record how far he observed the rules set down for his daily government, but he does not appear to have retired. His diary indicates an ambitious and restless disposition, and ambition probably tempted him to continue in the arena, and made him resolve later upon that "perpetual state of rivalry" with his brother judges, mentioned in the concluding portion of the diary.

The March appeal term at Montreal was as successful as that held during the month of January, in breaking down the list. Twenty-eight cases were heard or otherwise disposed of, leaving only 49 appeals pending. Cases were heard in ordinary course in which the judgment appealed from had been rendered quite recently. In fact, the list was disposed of up to the point where the appeals taken since January last commenced. Practically it may be said that there are now no arrears in this court, that is to say, parties ready to proceed have had the opportunity to be heard. Of course, a certain number of cases will usually be continued from one term to another owing to the absence or illness of counsel, or because, the evidence being voluminous, considerable time is needed to have it copied and printed. Then, too, counsel have to prepare their argument and have it printed. In most of the cases heard in March the factums were only produced a day or two before the hearing, and the court had repeatedly to urge counsel to be prepared to go on when their cases were reached on the list. The actual order in which the cases were heard shows the indulgence accorded to counsel in this respect. Thus on March 15, the fourth, fifth and eleventh cases were heard; March 16, the twelfth and thirteenth cases; March 17, the twenty-first, forty-seventh and twenty-third cases; and so on. In a circular recently issued by the attorney general the statement is repeated that business in this court is two years in arrear. This mistake was corrected in our issue of January 15 (p. 19), and the facts stated above show that the statement has still less foundation now. If any appeals from judgments rendered in 1893 have not yet been heard it is because counsel were either unable to get the papers ready in time, or, for some reason or other, preferred to postpone the hearing.

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The English bench has suffered serious losses within a few months. The death of Mr. Justice Stephen has

been followed by that of Lord Hannen, a very able and distinguished judge, and about the same time the cable despatches convey the intelligence of the death of Lord Justice Bowen, an equally distinguished and brilliant member of the bench. Sir James Stephen and Lord Hannen had retired some time before their decease. Lord Justice Bowen, it is stated, will be replaced by Sir Charles Russell, the attorney general in the present administration.

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Mr. Justice Stephen on the bench displayed those powers of mind and body which distinguished him throughout his career. In the style of his judgments and his writings he resembled somewhat the late Mr. Justice Ramsay, of this province, and in intense application to duty surpassed both that judge and the late Mr. Justice Aylwin, remarkable as were the achievements of those eminent members of our bench. The *Law Journal* says, "he has been known to begin work on circuit at five o'clock on one morning and continue trying cases in a crowded court until three in the next"—a proceeding, of course, extremely uncomfortable to the subordinate officials and others in attendance.

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The House of Lords, on the 2nd of March, rendered a judgment interesting to travellers. In the case of *Richardson et al. v. Rowntree*, their lordships held, affirming the decision of the Court of Appeal, that the holder of a passenger ticket was not bound, simply by delivery of the ticket, by the conditions inscribed thereon, the passenger knowing that there was printed matter on the ticket, but not having read it. The Lord Chancellor (Lord Herschell), Lords Watson, Ashbourne and Morris took part in the decision. This is in harmony with the decisions of our courts in analogous cases.

In *Fraser v. Ryan*, Superior Court, Montreal, March 8, 1894, an interesting question of procedure was decided by Mr. Justice Archibald. The Code of Procedure (art. 55) says no summons can be served after seven o'clock in the afternoon. The plaintiff in this case, however, applied to a judge and got authority to make the service after seven P.M. Had the judge authority to make such an order? Mr. Justice Archibald held that he had not, and treated the order and the service as a nullity.

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There has been a good deal of litigation of late between railway companies and the owners of cattle killed on their lines. Our Court of Appeal, on the 29th of March, rendered a judgment, in *Canadian Pacific Railway Co. & Cross*, which goes a long way to simplify and settle the question, if the decision be not overruled by the Supreme Court or Privy Council; but as the amount involved in these cases is usually small, it is hardly probable that the point will be carried further. The Court of Appeal holds that there is no responsibility on the part of the company as to animals straying, when they are killed on the track by passing trains. The following extracts from the observations made by Mr. Justice Hall, in the course of an elaborate judgment, will show the scope of the decision:—

“The respondent's cattle were loose and unattended in the highway in violation not only of the special provision of the statute, but of the municipal law of this province (Agricultural Abuses Act; Consol. Stat. L. C., ch. 26, sect. 5, and Municipal Code, Art. 447). If their owner could have proved that they escaped from his enclosure without fault on his part, or by reason of *force majeure*, he might have been exempted from payment of a fine for their trespass on the highway, but they certainly were trespassers in the view of the law, and could have been impounded as such. Therefore they were not properly in the place from which they got upon the railway, and in my opinion, therefore, the railway company was not legally liable for the damage caused by their being killed upon its track. This principle is in conformity not only with the decisions which were rendered under the earlier railway act, which I have cited, but with those subsequently rendered in Ontario, and by Mr. Justice

Brooks and Mr. Justice Ouimet in this province. The only conflicting decision, apart from the one now under consideration, is that rendered by this court in the case of *Pontiac and Pacific Junction Ry. Co., & Brady*, from the effect of which, as a precedent, we are relieved by the subsequent legislation on the subject. It is a physical and often a financial impossibility for railway companies to complete their fences and cattle guards at a given moment along several hundred miles of track, often through unsettled sections of country. They understand clearly that by delay they incur the risk imposed upon them by the statute, as interpreted by the common law, and they have a right to assume that that risk is limited to accidents to cattle, etc., which have a right to be in adjacent enclosures and connecting highways, and in my opinion the freedom from liability toward trespassing cattle is not varied by the primary negligence or lack of negligence of their owners in allowing such cattle to escape from their enclosures. Once astray upon the highway or in a neighbour's enclosure they are trespassers in the eye of the law, toward the public and equally so toward the railway companies.

"Some judges who have been ready to adopt this principle, in so far as adjoining fields and fences are concerned, have been inclined to make a distinction as to cattle-guards. I can understand some reasons why such a distinction might be made, but the statute has not made it. Throughout all the changes in the Railway Act, the rule for the maintenance of fences and cattle-guards is identical, and I can see no legal justification, therefore, for making a distinction in the interpretation of the liability for not constructing them, or the contributory negligence of those who suffer from their absence."

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Since our last issue the bar of Montreal has lost two of its members. Mr. E. T. Day, of the firm of Day & Day, was a gentleman little known in the active work of the courts. Never very robust, he naturally preferred the quieter duties of the solicitor branch of the profession. Among his friends and associates he was much esteemed for his amiable qualities and honorable disposition, and his venerable father who, at an age approaching ninety years, survives him, will have the sincere sympathy of his *confrères* in his bereavement. The other death we have to record is that of Mr. A. W. Smith, the youngest member of the firm of Maclaren, Leet, Smith & Smith, whose illness was extremely brief. Mr. Smith was a young lawyer whose attainments and standing gave excellent promise.

The Toronto *Mail* estimates that the average income of lawyers in that city is \$600 per annum. As a good many lawyers are known to make more than \$600 a year, it follows that many must make less or nothing at all. Those who clamor for making admission to the profession more easy should note a fact like that stated above. The profession is not prosperous anywhere just now. In England there are complaints of diminished earnings, and in France, judging from the following extract taken from the London *Daily Telegraph*, the condition of things is no better :—

“Many barristers complain continually that the profession is not what it once was in the matter of fees; that the few clients who love litigation are not so liberal in their disbursements as they ought to be. Hard as their lot may seem, it is preferable to that of their brethren in Paris, judging by the result of an investigation which a French contemporary has been making into the fees legally claimable by barristers there. From the taxed bill in a *cause célèbre* recently heard in the Palais de Justice, it appears that the fee allowed to the leading counsel of the successful litigant in a case which lasted two or three days was five francs, or the princely sum of 4s. 2d. The advocate was also an ex-Minister, which did not make any difference in the fee, and after he had made his brilliant oration he found himself compelled to fight a duel because of some *ex parte* statement contained in it—all for the legal fee of 4s 2d., duly taxed. Of course, the barrister did not content himself with the honorarium allowed by the law, but apparently the rest of the sum with which his services were rewarded came out of his client's own pocket.”

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#### MAGISTRATES' CASES.

##### *Cruelty to animals—The Check Rein.*

In the Recorder's Court, Montreal, April 13, the Society for the Prevention of Cruelty to Animals, prosecuted Mr. James Lowry, for alleged cruelty to a horse by the use of the overdraw check rein.

Mr. L. T. Marchal and Mr. Peers Davidson appeared for the prosecuting society, and Mr. St. Jean and Mr. McCormick, Q. C., were for the defendant.

In opening the case Mr Davidson observed that the proceedings were taken under the Criminal Code, sec. 512, sub-sec. (a), and

then went on to say that on the 24th ult. a citizen walking along St. James street, when opposite the Temple building, noticed a horse evidently in great pain standing by the side of the roadway, and secured with an iron weight. The cause of the pain which the animal exhibited was a very severe check-rein. Other persons besides the citizen alluded to gathered round the animal, and after watching it for some five or ten minutes one of them relieved it by loosening the check-rein. The defence would, no doubt, contend that the principle of the check-rein was a right one. Upon that point he wished it distinctly understood that the prosecution confined itself entirely to the circumstances of the present case, in which torture and pain were caused to the animal.

Mr. McCormick said the whole question was whether or not in this particular case the animal suffered pain. The society had no right to interfere with the public in the use of any means by which an animal would be rendered more serviceable. The contention of the defence would be that the check-rein was adopted by people in order to render an animal more serviceable, and that sec. 512 of the Criminal Code did not interfere with the use of such means.

The first witness called was Mr. Hutchinson, advocate, who deposed that on or about the 24th ult. he was walking along St. James street when he saw a horse, opposite the Temple building, checked up very high. The animal was throwing its head about, and it was apparent to any one that the horse was in great pain. Col. Whitehead, who was present, spoke to witness, asking if nothing could be done to put a stop to that kind of thing, and after a little conversation the result was that the present case had been brought. It was perfectly clear that in the case in question the use of the check-rein was a cruelty. Witness unfastened the overdraw check-rein and the horse became quiet. When the owner of the animal appeared he was spoken to, and he replied that no one could drive the horse without using the check-rein. Witness offered to drive the horse without it, but Mr. Lowry told him that he did not know what he was talking about, got into the vehicle and drove off.

Cross-examined—He had used an overdraw check-rein some four years ago, because when the horse was left standing it would start to nibble the grass; the rein, however, was always left quite loose, and the animal was not checked up in any way. The

man who will use a curb bit in case of necessity, and use it humanely, was not inflicting so much pain on an animal as was suffered by the horse in question, and for the reason that a horse soon began to know the curb bit and slowed up when it commenced to pain it; the head was not kept in a painful position the whole time. He had heard of a horse's jaw being broken by the use of the curb bit; he had not heard of a like occurrence with the overdraw check-rein. From witness' experience in driving he believed that a carriage horse drove better without the overdraw check-rein; but he had been told by those having experience with trotting horses that they went better when the overdraw check-rein was used.

Re-examined—Even if, as Mr. Lowry said, it was necessary to use the overdraw check-rein when driving the horse in question, there was no reason for the animal being checked up when it was standing in the street.

Mr. W. M. Ramsay, manager of the Standard Life Assurance company, also deposed to having seen the animal on the 24th ult., when it was standing outside the Temple building. The animal was in pain, and he had no doubt that it was caused by the use of the overdraw check-rein, which was perfectly tight.

Dr. Duncan McEachran testified that he had studied the overdraw check-rein since its introduction. It was used by horsemen in some instances to control animals that were difficult to control. Some horses would get their heads close into the neck, and in that position they were sometimes apt to bolt; in such cases the use of the overdraw check-rein was justifiable. It was the abuse of the check-rein which the Society for the Prevention of Cruelty to Animals wished to prevent. Witness had been frequently shocked by seeing horses with their noses forced up into the air, and the muscles of the head in a constrained position, so that the muscles of the neck became cramped, and the animal suffered torture. The abuse of the check-rein was most reprehensible, and should be denounced by every means. Although the overdraw check-rein might be useful in some cases, it was not useful in one case in a hundred. In all cases where a horse's head was held up so that it could not be got into a natural position the use of the check-rein was cruel. Overchecking was injurious to the muscles of the neck and the muscles of the back; in fact, the whole animal was in a constrained position and could not balance itself properly on its forefeet. It was a matter of sur-

prise to witness that men of intelligence would torture horses by using the check-rein. Even if it was necessary to use a check-rein on a particular animal when driving it, its use would not be justifiable when the animal was left standing by the side of the road. From the evidence already given witness had no hesitation in saying that the animal in question was suffering pain when seen by Mr. Hutchinson and Mr. Ramsay. The checking to which the animal was said to have been subjected would be both useless and cruel.

Cross-examined :—He knew that the check-rein was used on valuable horses like Maud S., but its use was, like many another thing, due to the fact that owners would submit to the fads and fancies of trainers. Even if some veterinarians of high standing favored the use of the check-rein, he did not think that the profession as a whole approved of it. He did not think that he had ever had to treat a horse that was suffering from anything which could be directly traced to the use of the overdraw check-rein, but many derangements were brought on in horses the cause of which it was sometimes difficult to trace.

Col. Whitehead corroborated the evidence of Mr. Hutchinson and Mr. Ramsay, after which Dr. Daubigny deposed that the abuse of the check-rein was cruel. With some animals the use of the check-rein was necessary. When properly used it was not cruel.

This was the case for the prosecution, and witnesses for the defence were called.

Mr. Lowry, the defendant, said that the horse was not suffering on the day in question from the use of the check-rein. The tightness of the check-rein which had been spoken of was due to the fact that the blanket which he had thrown over the horse was pulling upon it. Without the check-rein witness would not attempt to drive the animal, which was a very hard puller. He had tried the curb-bit, but the horse would not drive at all with it. When racing the horse he checked it up during the heats, and at the finish of each heat he loosened the check.

Mr. Geo. Clemmie knew the horse in question, and said that he had never seen the defendant check it up in such a way as to suffer pain. The animal was a very hard puller, and it was necessary to use the check-rein with it. The horse carried its head very high when driving, so that, although the check-rein

might appear tight when the animal was standing, it was not at all tight when the horse was in motion.

Dr. W. B. McGoun, who had had a large experience with valuable horses, approved of the overdraw check-rein; in fact, he had had some horses which he could not control without it. When driving a horse he almost always used the overdraw check-rein.

Mr. James C. King had many times seen the horse in question when it had the overdraw check-rein on, and he had never seen it suffering pain.

Mr. J. Barsalou, whose experience with horses was a large one, approved of the use of the overdraw check-rein, which kept a horse in better style, and an animal did not suffer from it.

Dr. Bruneau deposed that the check-rein was less brutal than the bit, and its use was sometimes necessary. With the horse in question the use of the check-rein, so long as the strap was loose, would not be cruel, as the animal was one which naturally carried its head high.

Other evidence of a minor character having been given, the case was closed.

On the 14th instant the Recorder dismissed the case. He said that it had been proved the check was necessary to manage the horse, and that moreover it was quite lawful to use a check to render an animal handsomer and thus give more value to the property of the owner. Mr. Lowry being a sportsman, added the Recorder, has an interest that his horse should show well, and thus being a better price. No doubt the check causes a certain amount of annoyance until the horse gets accustomed to it, but the annoyance is not caused unnecessarily, and the section of the Criminal code upon which this action is brought does not apply to the case in any way.

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#### *THE LATE LORD HANNEN.*

After a long and painful illness, borne with the fortitude which distinguished him throughout his life, Lord Hannen passed away at his residence at Lancaster Gate on the afternoon of the 26th ult. His health had been in an unsatisfactory condition for many years. While he was president of the Probate, Divorce, and Admiralty Division, he suffered from a painful malady,

which compelled him to undergo an operation. But such was his industry and strength of will that his ill-health did not prevent him from performing his judicial duties with a regularity which few judges have equalled, or from undertaking at the instance of the Government responsibilities of an extra-judicial nature of the highest importance. It was while he was in Paris, as one of the British arbitrators in the Behring Sea inquiry, that the fatal illness first began. For a time the proceedings of the commission were adjourned on account of his indisposition; and, although he enabled the inquiry to be resumed at the earliest possible moment, and played a leading part in bringing about the result of the investigation, his health gradually grew weaker, until he felt compelled to resign the office of Lord of Appeal. Not long before his death his condition appeared to improve, and hopes were again entertained of his recovery, but they were quickly followed by a relapse, from which he never recovered. For a judge Lord Hannen died at a comparatively early age, several occupants of the Bench being more advanced in years. He was born in 1821, his father being a London merchant, who lived at Kingswood, in Surrey. He was educated at St. Paul's School, and completed his studies at the University of Heidelberg, where he acquired his love of German literature and philosophy. His success in the legal world was due entirely to his own exertions, for his rise at the Bar—to which he was called at the Middle Temple in 1848—was not the result of family influence. For a time he encountered the vicissitudes of the briefless barrister, and occupied his leisure in writing for the press. It was his solid learning as a commercial lawyer which obtained for him a leading position as a junior on the Home Circuit in Westminster Hall. His style of speech was not adapted to what are known as sensational cases, though in the course of his career he appeared in the *Shrewsbury Peerage Case*, and was one of the prosecuting counsel in the trial of the Fenian prisoners at Manchester. As an advocate, all that he aimed at was lucidity, and this quality his speeches preserved in a remarkable manner. While on the bench he cultivated with success a more ornate style of speech. His judgments and summings-up were frequently models of pure and graceful English, and were notable for the number of apt illustrations they contained, and in the felicity of his phrases could be recognised the scholar as well as the judge. For five years Mr. Hannen was junior counsel to the Treasury.

He was raised to the Bench in 1868, exactly twenty years after his first appearance in wig and gown. He did not go straight to the Court with which his name is chiefly associated. For four years he sat in the Queen's Bench, where he distinguished himself by the versatillity of his learning and the independence of his judgment. It was in 1872 that he became judge of the Probate and Divorce Court. Three years later he was appointed President of the Probate, Divorce, and Admiralty Division. During the sixteen years he held this office he proved himself to be almost the ideal judge for such a tribunal. His knowledge of the law relating to the various sections of the division, his firm grasp of facts, his keen sense of the value of evidence, his painstaking industry and absolute impartiality, his courtesy and dignity—these qualities obtained for him the full confidence of the public and the high esteem of the profession. Perhaps no tribunal is more difficult to preside over than the Divorce Court. The character of many of the cases is such that the dignity of the Court is not always easy to maintain; but not once did Sir Jas. Hannen allow it to suffer in his hands. Any attempt at levity on the part of counsel or of witness immediately caused him to assume a severity of countenance which effectually nipped the flippant effort in the bud. It will, however, be his extra-judicial labours which will keep his memory alive longest. The laborious task he began in 1888, as President of the Parnell Commission, and which he performed in a manner in every way worthy of the 'great occasion,' will give his name an enduring place in the records of our time. Throughout the one hundred and twenty-nine days covered by the enquiry the judgment and bearing of Sir James Hannen were never disputed by the keenest partisan, while the industry and care with which he penned the greater part of the report received a universal tribute of praise. Not less valuable was the service he rendered the country on the Behring Sea Fisheries Commission, the satisfactory settlement of the difficult questions being largely due to his skill in tactics and charming manner. It is a somewhat remarkable coincidence that on the day on which Lord Hannen died Sir Charles Russell moved the first reading of the Behring Sea Bill in the House of Commons, and that within a few hours of his decease Major Le Caron, who played so prominent a part as a witness in the Parnell inquiry, died. He was appointed a Lord of Appeal in 1891, and retired in the Long Vacation of last year. His experience

and learning eminently fitted him to sit in the Final Court of Appeal, and one or two of the judgments he delivered displayed his great powers of keen reasoning and lucid exposition, but his opportunities were not numerous enough to enable him to show the full extent of his attainments. A man of simple pleasures, Lord Hannen was fonder of rural than of social life. Most of his holidays were spent at a charming retreat, where he was extremely popular among the humblest of his neighbours. Some thirty years ago Lord Hannen was regarded as an advanced Liberal. He stood for Shoreham in 1865, but his only effort to obtain a seat in the House of Commons was not successful, and probably the result was a fortunate one, because three years later he was raised to the Bench by Lord Beaconsfield, who might not have chosen him had he been sitting in the House of Commons as the representative of a Liberal constituency. Lord Hannen was married in 1847, the year before that in which he was called to the Bar. Lady Hannen died twenty-two years ago.

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On Tuesday, April 3, the first day of the Easter Sittings, reference was made by the Lord Chief Justice of England, the President (Sir Francis Jeune) of the Probate, Divorce, and Admiralty Division, and by Mr. Justice Barnes, to the death of the late Lord Hannen.

The Lord Chief Justice said that if there had been a greater English judge during the seventy-three years of his life than Lord Hannen it had not been his good fortune to see him. That he was a man of great ability, of remarkable learning, of intellect, strong, capacious, and penetrating power; that he was a man of inflexible integrity and stainless honour—this the whole country knew. But the whole country did not know, perhaps, that it was left with those who were blessed with his friendship to discover his warm heart, his steadfast kindness, his generous judgment, his rare consideration for the feelings of others, and his perhaps very moderate estimate of his own powers. Without going beyond the limits of good taste, he (the Lord Chief Justice) might raise for one moment the veil of sacred friendship, and say that he had known Lord Hannen for fifty years, ever since they were students at the Middle Temple together, and that in his case at least respect deepened into reverence and regard into love.

Sir Francis Jeune, before a very full Bar, said he felt that he could not commence the work of these sittings without paying a tribute to the memory and honour of the great judge who had recently died. For nineteen years Lord Hannen was associated with the legal business which was now intrusted to this division. During that time Lord Hannen gave many judgments, which had become landmarks in the law, and which were couched in that accurate and dignified language of which he was a complete master. But, speaking in the presence of those who knew him, he ventured to say that his fame was even more secure, at all events by reason of his careful, independent, and decorous administration of justice day by day. Nor were his public services confined to these Courts. When Parliament constituted a tribunal, unprecedented in character, investing it with much of the powers of the common law, and asked for judgment on the conduct of many members of the House of Commons, he believed it was the choice of the country, no less than that of Parliament, which summoned him to preside over that tribunal. Almost at the close of his career the highest authorities appealed to him, and not in vain—appealed to his indefatigable industry, which even failing health could not impair, to his mature wisdom, and to his charm of manner—to aid in the solution of a serious question of international law, to exemplify and to nurture the principle of international arbitration, and to protect the amity of the two great races of the English-speaking world.

Mr. Justice Barnes said he need scarcely say he was thoroughly in accord with all that had fallen from the lips of the President as to the character and merits of the great judge who had just passed away from them.

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#### *THE CONFESSIONS OF A LORD CHIEF JUSTICE.*

John Scott was Attorney-General for Ireland, and from 1784 till his death, in 1798, Lord Chief Justice of the Court of King's Bench in Ireland. He was created successively Baron Earls court, Viscount Earls court, and the Earl of Clonmell, and died possessed of property of the value of £200,000. Shortly before his death he gave peremptory orders that all his papers should be destroyed, and superintended himself the consignment of the documents to the flames. Through some strange fatality his diary escaped the general destruction, and is still extant. It was printed for private circulation among the members of Lord Clonmell's family, and short extracts from its pages have been given to the public

in a work by Mr. V. J. Fitzpatrick, entitled "Ireland before the Union," published in Dublin more than a quarter of a century ago, and now long out of print.

In his diary, Lord Clonmell reveals his true inwardness with the startling candor of a Marie Baskirtcheff. Here are a few extracts which lawyers of a later generation will read with keen interest:—

"GOOD RESOLUTIONS. Thursday, June 2, 1774.

I am I believe, thirty-five years old this month, just nine years at the Bar, near five years in Parliament, about four years King's Counsel. To-morrow, being Friday, Trinity terms sits. I therefore resolve to enter upon my profession as upon a five years' campaign, at war with every difficulty, and determined to conquer them. If I continue a bachelor until I am forty years old, and can realize two thousand pounds per annum, I will give up business as a lawyer, and confine it merely to the duties of any office I may fill. I will exert my interest to the utmost in law and constitutional learning for these five years, so far as temperance, diligence, perseverance, and watchfulness can operate, and then hey for a holiday."

"*Horrors of being unprepared in Court.*—The pains of the damned are not equal to the horrors of going to court unprepared, and the fact of losing your reputation and going down in it. Whilst, therefore, you have an atom of business undone, give up every object, pursuit, pleasure, avocation, diversion; banish everything from your mind but business—the business of your profession. Quarter of an hour to breakfast, one hour only to dinner when alone, two to exercise, four to bed, quarter to rest in a chair after fatigue, wine.

"*Prudence.*—Have an eternal guard upon what goes into your mouth and what comes out of it, and always wait a little before you answer, and answer all unpleasant questions by asking another question, and never before you can begin with a smile.

"*Cunning.*—Lord Bacon says a proper mixture of the lion and the fox is essential to a man of the world. I think the proper mixture is a fox's head, with a lion's heart to carry the scheme into execution.

"*Mechanical Habits.*—As often as you put your fingers across and join your thumbs at the points, which you must do a thousand times a day, call the right thumb courage, and the four fingers of the right hand sagacity, and spirit, activity and address; the left thumb prudence, the four left fingers, assiduity, flattery, temper and manner, thus you will always have these qualities in your mind and before your eyes to stimulate you."

"It is absolutely impossible to go on in my profession without perpetual horrors, injury, and disgrace, but by adhering inviolably to the following rules: Have no fire to go to before breakfast, which should be no meal; guard yourself at dinner from eating half what you wish, and drink at dinner as little as

possible, and after it water with your wine; go to bed at twelve and rise at four, and whilst you have existence in business employ from four to eight, from twelve to four, and from eight to twelve at business, which gives you eight hours for exercise, idle pursuits, and the world."

"*Discipline of an Attorney-General.*—He should rise at four in the morning; he should read without fire, standing, if possible, until eight; he should exercise, bathe, and dress at nine; he should see all persons until eleven; he should apply every minute until three in court business; to four he should set down the report of the day; he should not drink wine at dinner, and eat but a few things, and not much; he should not drink wine after seven, and from eight to twelve he should apply to business."

When Chief Justice, Lord Clonmell had his eye to the Lord Chancellorship, which was then held by Lord Lifford, who retained the Seals continuously for twenty-two years. "A race for the Seals," writes Lord Clonmell, "can be won but by superlative enthusiasm, watchfulness, temperance, diligence, and rapid acting." Lord Clonmell says that "Oliver Cromwell is the character best worth your imitation." There are several allusions to the Protector in the diary.

"20th June, 1785. To imitate Cromwell you should see what is useful and hurtful in everybody and in everything. Lay hold of one and avoid the other, and never complain, censure or find fault but to answer a purpose. Men and things are what God made them, and finding fault only shows ignorance and weakness."

The Chief Justiceship was not a bed of roses for Lord Clonmell, who thus speaks of his three puisne judges: "A perpetual state of rivalry with all the judges, especially with those of my own court, must be my constant object." Then there comes his judgment of the judges of his own court: Downes is crowing over me; he is cunning and vain, and bears me ill. Diligence is necessary: Hewitt is dying. Boyd is drunken, idle and mad. Diligence will give me health, fame and consequence."

Surely *laudatores temporis acti* will not find in Lord Clonmell's diary much foundation for their faith.—*Law Times*.

**BAR PICTURE.**—At a meeting of the Council of the Bar of Montreal, held on the 28th of February, it was resolved: That H. C. Saint Pierre, Q. C., C. B. Carter, Q. C., and Ed. Guerin, Esq., be named a committee to consult with Messrs. W. Notman & Son, regarding the group picture of the officers and members of the Bar of Montreal, which they propose taking. Members who have not yet availed themselves of the Messrs. Notman's invitation are requested to call at their earliest convenience. Mr. Arthur Delisle, of the Advocate's Library, will give any information desired. He asks us to mention that the judges are also included in the picture.

# THE LEGAL NEWS.

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VOL. XVII.

MAY 1st, 1894.

No. 9.

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## *CURRENT TOPICS AND CASES.*

An unsatisfactory feature of the annual report of the bar of this section is the large number of complaints which have been made against members during the past year. The mere investigation of these charges has become a serious business. Moreover, the knowledge that such cases are of frequent occurrence excites the distrust of the public, and works injury to all practising advocates. The whole subject deserves the serious consideration of the council in the interest of the profession.

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The number of cases reported in places comparatively thinly populated, like this province, or the province of Ontario, offers a striking contrast to the number reported in an old and densely peopled country like England. The English Law Reports for the year 1893 contain only 484 cases for all the courts. The Quebec Law Reports for the same period comprise 327 cases. In 1892 the number was 324. So that for a population of a million and a half the number of cases reported is nearly as great as for a population of thirty millions. One of the principal causes of this is the large number of judges of co-ordinate au-

thority sitting singly, to which must be added the little weight given by judges to the decisions of their colleagues, and the constancy with which they adhere to their own views, even after (in some instances) being overruled by the Court of Appeal. Lawyers know this, and love to pile up as many citations as possible in favor of their side of any particular question, hoping to prevail by dint of numbers, just as one witness after another is often called to give evidence of the value of real estate, in the expectation that the other side will be overwhelmed by the multitude of witnesses. And in order to be able to cite the cases, lawyers wish them all to be reported, but meanwhile the science of the law makes little progress compared with the number of decisions.

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Mr. David Dudley Field was a remarkable example of mental and physical vigour. He was born Feb. 13, 1805, and was therefore in his ninetieth year on the 13th April last, when he died somewhat suddenly of an attack of pneumonia. He had just returned from Europe where he had passed the winter. He got a chill in driving from the steamship landing to his residence, and died within forty-eight hours. Mr. Field commenced the study of the law in 1825, was admitted to practice in 1828, and settled in New York. His name is chiefly associated with the cause of codification and law reform, but apart from this supreme object of his life he was an able and gifted advocate and counsellor, and for more than forty years held a leading position at the bar of New York.

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The Court of Appeal (Montreal, 28 April, 1894) unanimously affirmed the judgment of the Court of Review in *Roch v. Thouin*, reported in 3 C. S. 141. The court referred to the case of *Pacaud v. Constant*, which was noticed at length in Vol. 16 of this publication, pp. 325, 326.

In *Lahay v. Lahay*, decided by Mr. Justice Tait at Sherbrooke, March 6, 1894, an interesting question of status came up. The mother of the plaintiff, when he was about seven years old, was married by the defendant. Six years later the plaintiff was baptized, and in the act of birth he was described as the son of the defendant and his wife, who were both present at the ceremony and signed the act of birth. Plaintiff continued to live with them as a member of the family until he was 18 or 19 years of age, when he went away to the United States. After his mother's death he claimed not only the real estate owned by her before her marriage, but also one half of the community which had existed between her and the defendant. The latter pleaded that the plaintiff was not his child, and that he had never intended to recognize him as such. There was evidence that the plaintiff had always retained the name of his mother up to the time of her death, and had married in that name, which was also that of a cousin with whom it was rumored that his mother had been intimate before the plaintiff's birth. The question was whether plaintiff had established that he was the son of defendant. The court held that it was not competent to the defendant to contradict the acknowledgment of paternity made by him in the act of birth, by parol evidence of public rumor, or statements made by plaintiff's mother in the course of conversations. It was held that there was no evidence to sustain the plea, and therefore the plaintiff was entitled to his rights as a child legitimated by the marriage of his parents.

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#### NEWSPAPERS AND CONTEMPT OF COURT.

It is to be hoped that the decision of Mr. Justice Mathew and Mr. Justice Cave in the case of *Duncan v. Sparling and others* will do something to check the feverish eagerness of litigants to invoke the aid of the process of contempt of Court whenever their disputes are commented on by the press in terms of which they disapprove. The facts were simple and amusing. The

plaintiff, Miss Duncan, was and is a member of a body calling itself the Democratic Club. A misunderstanding arose between her and the club committee. She was suspended from the rights of membership, and applied to Mr. Justice Grantham for an interim injunction to restrain the committee from suspending her. Ultimately Mr. Justice Grantham refused the application. An appeal was taken to the Divisional Court. At this point the comedy of errors began. The Divisional Court, being desirous to prevent any inferences adverse to the lady being drawn at this stage in the proceedings, did not allow the affidavits to be publicly gone into. It appears, however, to have been stated in open Court, first, that Miss Duncan had been expelled from the club, and, secondly, that the rule under which the committee had acted was one framed against drunkenness, gambling, and bad language. Mr. Finlason, the able reporter for the *Times*, recorded these alleged facts; but inspired by a kindly wish to save the public from misunderstanding what the nature of the charge against Miss Duncan was, he extracted from her affidavit (which had not been read) and embodied in his report a paragraph to the effect that the head and front of her offending was an allegation that she had allowed a gentleman to drink out of her shoe! This report duly appeared. The humour of the thing caught the journalistic eye of one of the news editors of the *Westminster Gazette*, and he reproduced in an abbreviated form and with comments the report in the *Times*. The paragraph in the *Westminster Gazette* in turn attracted the attention of a writer on the staff of the *Daily Telegraph*, and he, too, commented on the incongruity of democrats managing a social millennium by potations from a lady's shoe. *Hinc illæ lacrymæ!* On these slender materials Miss Duncan based her application for a committal. The learned judges dismissed it summarily, though in the case of the *Times* without costs, and emphatically declared that nothing in the nature of a contempt had been committed. We are not concerned to defend the prudence of the reports and comments to which Miss Duncan objected. But it is simply monstrous that the time of the Courts should be taken up and that newspapers should be harassed by such applications. We can conceive of nothing better fitted to make the process of contempt of Court contemptible: and we trust that the result of the present case will convince the far too numerous body of litigants who are so ready to appeal to Cæsar with a cry of *læsa majestas* that our legal tribunals are of the same opinion.—*Law Journal (London.)*

## ENGLISH DECISIONS.

*Bankruptcy—Money paid to solicitor for defence of bankrupt on criminal charge—Refusal to order repayment.*

On the 10th of December, 1893, £275 was paid by a debtor to his solicitor for the purposes of his defence on a charge of murder, and on the 20th of December the debtor committed an act of bankruptcy, of which the solicitor, on the 21st of December, had notice. On the 20th of January a receiving order was made against the debtor, and an application was made by the trustee in bankruptcy to the Tunbridge Wells County Court, that the solicitor should be directed to return the money, or at least the balance after deducting disbursements made before the 21st of December, the date the solicitor had notice of the act of bankruptcy. Held, that by the terms of the agreement the money on payment became the solicitor's money; that under no circumstances could the solicitor have demanded more than £275 from the debtor; nor could he be compelled to refund any he had received, and that the agreement was perfectly *bona fide* and valid. Per Wright, J.: The defence of a man charged with murder was probably a matter for which the official receiver might have made the debtor an allowance under the Bankruptcy Rules, 1886, r. 325.—*Re Charwood; Ex parte Cripps*, Q.B.D., in bankruptcy (Williams and Wright, JJ.), February 25th, L. T. 414; L.J. 147; W.N. 40; 10 T.R. 317.

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*Bankruptcy—After acquired property—Trading while undischarged—Second bankruptcy—Rights of trustee under first and second bankruptcies—Bankruptcy Act, 1883, sect. 44.*

Where an undischarged bankrupt contracted debts and was again adjudicated bankrupt, the County Court judge directed the official receiver to divide the estate first among the creditors of the first bankruptcy, and if there was a surplus to divide that amongst the creditors of the second bankruptcy. Held, on appeal, that the property passed wholly to the trustees under the second bankruptcy to be administered by him without prejudice to the claim, if any, of the creditors in the first bankruptcy to rank for proof. The trustees under the first bankruptcy had intervened too late, because a perfect title had then

by statute become vested in the official receiver as trustee under the second bankruptcy.—*Re Clark; Ex parte Dickinson*, Q. B. D., (Williams and Wright, JJ.), L. T. 438.

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*Charter party—Clause as to advance of freight—Construction of.*

By a clause in a charter-party, it was provided for "cash for steamer's ordinary disbursements at port or ports of loading, not exceeding £150 in all, to be advanced at exchange of 50 d. to the dollar on account of freight, subject to 3 per cent. to cover cost of insurance, etc., (captain's receipts to be conclusive evidence of the amount of such advances and of their having been properly made), and balance of freight on right and true delivery of the cargo in cash." On the first voyage the captain, having outward freight in hand, expended it in partly disbursing the vessel, and cash was advanced by the defendants for the balance. This sum, with the agreed percentage, together with the sum representing the profit the defendants would have made on the sum required to make up the advance of £150, was deducted by them from the balance of freight due to the plaintiffs on delivery of cargo. On the second voyage the captain had enough outward freight to fully disburse his vessel, and required no advance. On delivery of cargo plaintiffs deducted the profit they would have made on the full advance of £150. Held, that the fair meaning of the clause in the charter-party as to advance of freight is, that the shipowners are to be in a position to ask through their masters for sufficient to pay the disbursements, if they required it, but not otherwise, and that, what the plaintiffs sought to recover was due for freight, and that the defendants were not entitled to make a cross-claim for the amount, or to deduct it from the freight.—*The Primula*, P.D. & Ad. (Barnes, J.), February 6th, L. T. 392.

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*Copyright — Infringement — Reproduction of paintings — Living figures in painted backgrounds—Fine Arts Copyright Act, 1862, sects. 1, 6.*

Motion by owner of copyright in certain pictures to restrain the proprietors of a theatre from representing the plaintiff's pictures at their theatre by the grouping of living persons attired

with painted backgrounds and properties. Held, that representation by living figures was not a reproduction within the meaning of sect. 1 of the Fine Arts Copyright Act, 1862, which must be of a painting character; but as to the backgrounds, motion ordered to stand over till the trial or further order upon the respondents' undertaking to take photographs of the backgrounds used, to keep an account of the number of times each background was exhibited, and of all moneys received for admission when any of the backgrounds should be exhibited.—*Hanfstaengl v. The Empire Palace Limited and others*, Ch. D. (Stirling, J.), February 16th, L.T. 390; S.J. 270; 10 T.R. 288.

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*Damages—Inadequacy—New trial.*

The plaintiff, who was an accountant 70 years of age, earning from £3 to £4 a week, sued defendants for damages for personal injuries received through negligence of defendants' servants. The plaintiff was in hospital for four weeks, and during this time he lost his weekly earnings. At the trial the jury found a verdict for the plaintiff, damages £12. The plaintiff then asked for and obtained judgment for this amount with costs on the County Court scale. The plaintiff now applied for a new trial on the ground that the damages were inadequate, inasmuch as the jury had only given plaintiff his loss of earnings, and nothing for suffering and loss of his fingers, which had to be amputated, and the defendants gave cross notice of application for judgment upon the ground that there was no evidence of negligence to go to the jury. Held, that on plaintiff's motion for a new trial upon the ground that the damages were inadequate, it must be taken that negligence in the defendants was proved, and that that negligence caused the plaintiff's injuries, but that as the jury had only given him his loss of earnings, the damages were wholly inadequate, and the plaintiff's application for a new trial must be granted. As to the defendants' application, the Court could not say that there was no evidence of negligence. It must be a question for the jury. Therefore the cross-application of the defendants failed, and the plaintiff must have the costs of the application and of the cross-application.—*Burrows v. London General Omnibus Company, C. A.* (Lord Esher, M.R., Lopes and Davey, L.JJ.), February 21st, 10 T.R. 298.

*Libel—Privileged occasion—Letter dictated by solicitor to clerk.*

The defendants, Goblet Frères, instructed their solicitors, the co-defendants, Wrensted & Sharp, to obtain payment of a debt from a Mrs. Buderis. After certain enquiries, the defendants, Wrensted & Sharp, wrote a letter containing defamatory statements concerning the plaintiff, Mrs. Boxsius. This letter was dictated by one of the solicitors to a shorthand clerk, and subsequently handed to a copying clerk to be copied into the letter-book. Held, that the letter was communicated to the solicitors' clerks on a privileged occasion, inasmuch as it was so communicated in the ordinary course of their business as solicitors; and, *per Lopes, L.J.*: If the communication made by a solicitor to a third party is reasonably necessary and usual in the discharge of his duty to and in the interest of his client, the occasion is a privileged one.—*Boxsius v. Goblet Frères and others*, C.A. (Lord Esher, M.R., Lopes and Davey, L.J.J.), February 28th. L.J., 161; S.J., 311; 10 T.R., 324.

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*Libel—Privileged occasion—Solicitor acting for client—Communication in ordinary course of duty.*

A client had employed a solicitor to sue the plaintiff for money alleged to be due. After the writ was issued an auctioneer, acting on the instructions of the plaintiff, advertised the sale of his furniture and effects, and thereupon the solicitor, acting for his client, wrote to the auctioneer, stating that an action had been commenced against the plaintiff, and that he had committed an act of bankruptcy upon which an order in bankruptcy might be made against him, and giving the auctioneer notice not to part with any moneys which he might receive as the proceeds of the sale. On this letter the plaintiff sued, the solicitor for libel. Held, that the solicitor in writing this letter was acting within his ordinary duties as solicitor, and that the occasion being privileged as regards the client, was privileged also as regards the solicitor, and that there was no evidence of actual malice. Judgment for defendant.—*Baker v. Carrick*, C.A. (Lord Esher, M.R., Lopes and Davey, L.J.J.), February 22nd, S.J. 286; L.J. 144.

*Principal and agent—Scope of agent's authority—Negligence—Bailment.*

Action for damages in respect of injury done to a bass fiddle. Plaintiff left her fiddle in ante-room of a hall belonging to defendant and hired for a concert. The fiddle was so placed that the hall-keeper, when he came to turn on the gas, was obliged to move it, when almost immediately it fell with a crash and was seriously injured. No notice had been given to the hall-keeper that the fiddle had been placed where it was, but the judge found that it was not an improper place in which to leave it. Held, that there was no evidence of any contract of bailment between the plaintiff and the defendants, and no duty and no evidence of negligence on the part of the hall-keeper, and that the care of valuable instruments was not within the scope of his authority. Judgment for defendant.—*Neuwirth v. Over Darwen Industrial Co-operative Society*, Q.B.D. (Mathew and Collins, JJ.), February 14th, L.T. 392; L.J. 133; 10 T.R. 282.

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*Salvage—Unsuccessful services—Remuneration.*

Where there is a request to render assistance to a ship, and service is in fact performed as far as it is possible to do it, and the ship is afterwards saved by other means, the persons who rendered the services are entitled to some salvage remuneration.—*The Helvetia*, P.D. & Ad. (Barnes, J.), February 27th.—L.T., 439.

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*THE LATE LORD JUSTICE BOWEN.*

It is with deep regret that we record the death of Lord Bowen, which took place early on Tuesday morning, April 10, at Albert Hall Mansions. The event is accentuated by the fact that he has passed away within a few days of the death of Lord Hennen, whom he succeeded as lord of appeal about seven months ago. He fell a victim to an internal disease, the growth of which caused him frequently to be absent from the Court of Appeal, but the terrible pain of which never caused him, even up to the last hour of his suffering, to lose that serenity of temper which was not the least of the many gifts he displayed. He knew that death was near several days before it came, but "resignation

gently sloped the way," and he passed away most peacefully. It was a close to a very laborious but singularly calm life, for whatever task he undertook was discharged with the ease and deliberation of the scholar, with a professional dignity which banished all idea of anxiety and haste.

Charles Synge Christopher Bowen was born in 1836, being the eldest son of the Rev. Christopher Bowen, of Freshwater, in the Isle of Wight. He has died, therefore, when most judges are fresh to judicial life, but so rapid was his progress in the profession that had he lived until June he would have completed fifteen years of service on the Bench. His professional success had a fitting prelude in his scholastic accomplishments. He distinguished himself at Rugby in play as well as work. He was in the first eleven, was noted among his schoolfellows as a sprinter and hurdle racer, and became a member of the football team. He was elected captain of the school. The promise of his Rugby days was more than fulfilled by his University achievements, both as a scholar and an athlete. Oxford can claim few more brilliant sons. He carried off the Hertford and Ireland scholarships, and, among several other prizes, he won the Arnold with an essay on Delphi. In 1858 he took a first-class in classical honours, and shortly afterwards became a Fellow of Balliol. He maintained a close connection with his college throughout the remainder of his life. He held the post of visitor, and was on intimate terms of friendship with Dr. Jowett, whose funeral he attended as a pall bearer. Called to the Bar at Lincoln's Inn in 1861, he chose the Western Circuit, on which Lord Coleridge's friendship secured for him an early start in the profession. The construction of his mind was far too subtle, however, to enable him to obtain any striking measure of success in ordinary circuit cases. His real powers were not recognised until, at the instance of Lord Coleridge, then Attorney-General, he was appointed junior counsel to the Treasury in 1870. During the nine following years he lived a most laborious life, his official business and large private practice often compelling him to work almost day and night. Among the cases in which he appeared was the Tichborne trial. With Mr. Chapman Barber, he settled the indictment for perjury, and he played a very active part in preparing the materials for the cross-examination of the claimant's witnesses. His style of speech was too academic to make him an effective advocate in jury cases, but he was recognised as

a lawyer of deep and versatile learning, and, when he was appointed a judge of the Queen's Bench Division in 1879, passing straight from the junior Bar to the Bench at the early age of forty-three, his qualifications for the honour were universally acknowledged. His success at *Nisi Prius*, however, was not great. The trivial facts of ordinary disputes were not worthy of his intellectual strength, and his summings-up were frequently above the heads of the jury. But whenever he allowed free play to his powers of irony, his addresses to the jury were most entertaining. While on circuit, he tried a burglar who had entered the house from the roof and left his boots on the tiles, and who alleged, by way of defence, that he was accustomed to take midnight strolls on the roofs of dwellings, and that he had simply been led by a feeling of curiosity to descend into one of the houses. "If, gentlemen," said Lord Bowen to the jury, "you think it probable that the prisoner considered the roofs of houses a salubrious place for an evening walk—if you suppose that the temptation to inspect the interior of the houses beneath him was the outcome of a natural and pardonable curiosity—in that case, of course, you will acquit him, and regard him as a thoughtful and considerate man, who would naturally remove his boots before entering the house, and take every precaution not to disturb his neighbours." He found his true sphere in 1882, when he was promoted to the Court of Appeal, in succession to Lord Justice Holker. During the eleven years he sat as a Lord Justice, he delivered a series of judgments remarkable for the accuracy of their law and the elegance of their diction. No judge has delivered so many brilliant judgments at so early an age. To read them is to learn how closely it is possible to join legal erudition and literary grace. He was equally at ease in hearing common law appeals with Lord Esher, and determining Chancery appeals with Lord Justice Lindley; in whichever branch of the Court of Appeal he sat, his judgments were marked by the same depth of learning, the same knowledge of the evolution of the law, the same lucidity and felicity of phrase. He possessed, too, a firm independence of judgment, which not infrequently caused him to disagree with the conclusions of his learned brethren. Among his most notable judgments were those he delivered in *The North Central Waggon Company v. The Manchester, Sheffield, and Lincolnshire Railway Company*; *Thomas v. Quartermaine*; *Scott v. Morley*; *Boston Deep Sea Company v. Ansell*; *Vagliano*

*Brothers v. The Bank of England*; and *Borthwick v. The "Evening Post."* His wit was certainly not the least attractive of his gifts. Within the last few days many stories have been told of his humour, and although all the caustic sayings attributed to him were not uttered by him, they give some idea of his power of irony, though those who did not hear the gentle voice or observe the modest manner in which they were delivered can have no true notion of their charm. To many it was a matter of regret that one so gifted with literary power should have contributed so little to the literature of the country. His contributions consist of "Virgil in English Verse," a graceful and scholarly translation; his college essay on "Delphi"; a powerfully written pamphlet on "The Alabama Claims," in which he dealt with the contentions of "Historicus," of whom he wrote: "He borrows legal codes from municipal law and projects them into space"; and the essay on "Law" he contributed to Mr. Humphry Ward's collection of essays on the Victorian era. His literary labours would, no doubt, have been more numerous if his health had been more robust. For several years he was engaged in a translation of the "Georgics," now left unfinished. The qualities which won for him the esteem of the Bar obtained for him the affectionate regard of a large circle of friends. How highly his genial nature and conversational powers were valued in private life was shown by the warm tributes paid to his memory by the Master of the Rolls and Mr. Justice Wright. Among his greatest friends and admirers was Mr. Gladstone, who delighted in his classical learning, and who not very long ago lunched with Lord Bowen in his room at the Royal Courts of Justice. The confidence he inspired in official and political circles was shown by his appointment as chairman of the Featherstone Commission. He was an excellent after-dinner speaker, the speech he made in proposing the health of Sir Frederick Leighton at the Academy banquet of 1891 being among the most successful of its kind ever delivered in Burlington House. The famous Jackson case, in which the law relating to husbands and wives was dealt with, had first been decided by the Court of Appeal, and this is how Lord Bowen contrived to associate the case with the chief picture of the year: "I see before me as I address you a great picture of your own which appeals especially to myself as a lawyer. It represents Persephone, Queen of Heaven, returning from her husband's to

her mother's embraces, released from an unwelcome honeymoon by the special order of the Court of Appeal, to which I have the honor to belong. I am informed on credible authority—but my sight is too indistinct to admit of my verifying the statement—that in the background, although at an extreme distance, may be seen my learned friends, the Lord Chancellor and the Master of the Rolls, looking with pleasure at the liberated captive." Lady Bowen, whom the late judge married in 1862, is a daughter of the late Mr. James Medows Rendel, and a niece of the newly created baron of that name, through whom Lord Bowen became intimate with the ex-Premier. The legal profession has lost one of the most accomplished and popular men that ever belonged to it, the country has been deprived of the services of a judge who possessed in a rare degree the high qualities most needed on the Bench.—*Law Journal, (London).*

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At the sitting of the Court of Appeal on Tuesday the members of both divisions came into Court, including the Master of the Rolls, Lord Justice Lindley, Lord Justice Lopes, Lord Justice Kay, Lord Justice Smith, and Lord Justice Davey.—The Master of the Rolls said: I think that the Bar will expect, as the late Lord Bowen was for so many years a member of this Court, that this Court should express that which we know the whole profession feels, the extreme regret and sorrow we all entertain for the terrible loss which we all have just sustained. It is true to say that as Lord Bowen left this Court some few months ago, this Court as a Court has not by this death suffered any special and peculiar loss; we have not lost more than the whole profession has lost. But that loss is so great that we must express what we feel. I cannot have any doubt that Lord Bowen was one of the most distinguished judges who have sat in the Courts of England in my time. His knowledge of the whole law of England was so perfect and so accurate, and the whole law was so much at his command, that I have no doubt that he had studied every head and particular of English law, not merely when a particular case involving the proposition in question came before him for opinion or advocacy when he was at the Bar, nor when as a judge he had to consider the proposition in his judicial capacity, but he had studied the law minutely and earnestly before ever he was called upon to pronounce an

opinion upon it. His knowledge of the law was vast; his power of expressing what the law was you all have experienced often and often. I cannot fail to say that the workings of his mind were so beautifully fine that sometimes what he said escaped me. My mind is not so finely edged. I am more inclined to consider cases and to form my opinions on them in a rougher business manner, and to use rougher business language when dealing with matters of law relating to business. His mind was so beautifully fine and subtle that he delivered perfectly expressed essays upon the law which will be handed down for use by future generations of lawyers. His manner never swerved from a gentle kindness to every one. In private life I did not have the same advantage of knowing him so intimately as did others, some of whom are present here. Still I knew him well. That charming mind and perfection of diction were as great in private life as in Court, and gained for him the admiration and affection of all who knew him. I cannot fail to express my own deep sorrow and regret at the loss which we have sustained, and how that loss can be made up for us I myself cannot see. In uttering these few remarks I speak on behalf of all his late colleagues in this Court, and I think I may add on behalf of all the other judges with whom he was associated in his judicial career.

The Attorney-General said: My Lord,—I feel certain that your lordship has only been fulfilling the expectation of the Bar in uttering the words which you have just spoken. The Bar would have been disappointed if so great a judge as the late Lord Bowen, who had been so long engaged in the administration of justice, had passed away without some reference being made to so sad an event. My lord, the Bar thank you for your kind and sympathetic words. Having myself known him for quite forty years, and having known him intimately for a great part of that time, I would not wish to use language of exaggeration in speaking of the great loss that we have all sustained; but I do not think it any exaggeration to say that the world is poorer by the loss of a great man, the country is poorer by the loss of a great judge—a judge of rare and unique power, and we of the Bar mourn the loss of as genial, kindly, and trusted a friend as ever lived.

*LIMITATION OF ACTIONS BILL.*

The Lord Chancellor, in moving the second reading of this bill, explained that during the discussions on the Employers' Liability Bill the question was raised whether the period within which actions must be brought was not in some cases too long. At the present time, in the case of some torts, the period of limitation was six years, and in the case of others it was four years and two years. It was desirable, he thought, that when a wrong had been sustained the party charged with liability in respect of it should receive notice of action without undue delay, because the longer the time that was allowed to elapse the greater probably became the difficulties of defence. Witnesses, for example, might die in the interval, or change their place of residence so that they could not be found. The general period of limitation in the case of torts might well be reduced to one year, and that the bill proposed to do. Where, however, a wrong had been committed, but was not discovered and could not with reasonable diligence have been discovered within the period of one year, the period of limitation would remain the same as now, provided that the action was commenced within one year from the time when it could with reasonable diligence have been discovered. The bill also extended to actions of contract. At present the period of limitation for such actions was six years, and the proposal in the bill was to reduce that period to three years except in cases of debts not exceeding 5*l*. In those cases the period would be one year. This exception had been suggested by the report of the committee of their lordships' House on the subject of commitments in County Courts. He rather expected that the proposals in the bill with regard to actions of contract would cause some little controversy, and if a very strong opposition were shown to them he should be willing for the present to confine the bill to the question of the limitation of time for actions of tort.

Viscount Cross observed that the committee referred to by the noble and learned lord were unanimous in holding that the statutory period for the recovery of small debts ought to be materially reduced.

Lord Ashbourne thought that some of the provisions of the bill would need careful examination in committee.

Lord Halsbury, who approved the bill, remarked that great

care must be taken as to the phraseology excluding actions founded on trespass to land from the operation of the bill.

The Marquis of Salisbury thought that the provision limiting to one year the period for actions on debts not exceeding 5*l.* might possibly be disadvantageous to the poor. A poor man owing a tradesman, say, 4*l.* 10*s.*, and being for the moment unable to pay, might be induced by his creditor to increase the debt to a higher figure than 5*l.* in order to prevent the provisions of this measure from applying.

The bill was read a second time. *April 16.*

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### GENERAL NOTES.

**NECESSARIES.**—His Honour Judge Lumley Smith decided that a new set of false teeth was not a necessary for which the separated wife of a Sussex saddler was entitled to pledge her husband's credit. We hope the teeth supplied were as sound as the law; but in giving judgment the learned judge hardly gave sufficient effect to the maxim that the luxuries of one generation are the necessities of the next, and its possible application to the case of artificial teeth, for he said that man had done without them for centuries—in fact, during the reign of the common law—and that no parish doctor would order them to be supplied as parish relief, to which the modern philanthropic politician would, like Bumble, reply, 'The Poor Law's a hass.' We have heard of another husband who took a different view of his rights as to his wife's false teeth. His house was burnt and she within it, whereupon he included in his claim on his fire-policy 10*l.* in respect of his interest in the false teeth.—*Law Journal (London).*

**PRIOR USE.**—A patentee recently protected a small domestic appliance. Sometime afterward a too enterprising antiquary ransacking the tombs of Egypt turned up a similar appliance, which he considers to have been in use three thousand years ago. This discovery, in the opinion of an expert, vitiates the letters patent recently granted, inasmuch as the invention for which protection was therein granted was not new and original.—*Law Gazette.*

# THE LEGAL NEWS.

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VOL. XVII.

MAY 15th, 1894.

No. 10.

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## CURRENT TOPICS AND CASES.

In an amusing case which occurred at Hong Kong, and which will be found in the third volume of the *Lower Canada Law Journal* (A.D. 1867), p. 107, counsel expressed contempt for the court by "a stare of astonishment," and by "opening his eyes very wide." Among the contempts of which Mr. Pollard, the defendant in that case, was convicted were two "tones and manners," etc. The Court of Review at Montreal has discovered a contempt conveyed in six notes of exclamation, following an extract from the judgment under review, and although the counsel gained his case the fee usually allowed on the factum was struck off. Three years ago Mr. Justice Jetté directed attention to improprieties of the same description (14 Legal News, p. 41). It is now formally intimated that in future no fees will be allowed to lawyers who offend by the unrestrained expression of their sentiments on the subject of the decisions which they are appealing from.

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Another matter to which the Court of Review has directed attention is the practice of writing documents forming part of the record on both sides of the page. Where a number of papers are attached for the purposes of review or appeal there is an obvious inconvenience in

having to turn the record round with every turn of the page. It may be useful here to remark that lawyers—and judges also—who prepare anything for publication should remember that only one side of the paper should be used. Some judges of the Quebec section are the greatest offenders in this respect, it being common to see pages of paper closely written on both sides, and, moreover, full of abbreviations. Only such abbreviations as are intended to appear in the printed page should ever be used in preparing manuscript for publication.

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An Act of the legislature of Pennsylvania, passed in 1870, made it a misdemeanor for any person, partnership or association other than a corporation to issue policies of fire insurance. One Samuel B. Vrooman was prosecuted with others, not incorporated, for insuring furniture. Judge Biddle, of Philadelphia, in giving judgment, declared the Act unconstitutional. He said: "That no citizen can agree to indemnify another against loss by fire is certainly a most startling proposition. The most odious species of monopoly is where a government grants to a body of men any particular trade or business. If the power exists, the legislature could grant to one corporation the exclusive right to sell dry goods, inflicting penalties upon anyone who interfered with it." The late Mr. Justice Mackay, in his treatise on Fire Insurance, which appeared in the LEGAL NEWS observes, (Vol. 13, p. 141), "There seems to be nothing to prevent any private individual from carrying on the business."

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"The Seal Arbitration, 1893," is the title of an interesting article issued in pamphlet form (Montreal, Wm. Foster Brown & Co.), written by Mr. Donald Macmaster, Q.C. Within the limits of about sixty pages the author reviews the whole question, and gives a summary account of the negotiations which preceded the reference to arbitration, and the questions which were submitted to the commis-

sion. Naturally Mr. Macmaster is severe upon the terms of the reference, which prevented the arbitrators from disposing of the whole matter, and more especially excluded from consideration the question of liability for damages suffered by the owners of vessels unlawfully seized in Behring Sea. Full credit is accorded to the arbitrators themselves and to the eminent and learned counsel engaged in the case, for doing the best that was possible under the terms of the reference. Canada did not get all that she might reasonably have expected from the award: on the other hand Canada was specially interested in having a troublesome question between the two countries disposed of in a peaceful manner. The pamphlet of Mr. Macmaster, which treats the subject in a very clear and able manner, will be found useful to those who wish to have in a convenient form the leading incidents of this famous arbitration.

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The solicitor-general, Sir John Rigby, has been promoted to the office of attorney general vacated by Sir Charles Russell, and Mr. R. T. Reid has been appointed solicitor-general. It is stated that these appointments are now made with the understanding that the law officers shall cease to take any private cases. Up to the present time they have had the privilege of practising privately before the House of Lords and Privy Council. Now their whole time is to be available for official duties.

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The Montreal appeal list for the May term has shrunk to 61 cases, including two re-hearings. Only 12 new appeals appear on the list since the March term.

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## COURT OF APPEAL.

LONDON, April 23, 1894.

Before LINDLEY, L.J., KAY, L.J., SMITH, L.J.

SMITH v. HANCOCK. (29 L. J., 263.)

*Restraint of Trade—Sale of business—Agreement by vendor 'not to carry on or be in anywise interested in' similar business—Wife of vendor carrying on business with separate estate.*

Appeal from a decision of KEKEWICH, J. (reported 63 Law J. Rep. Chanc. 201; L. R. (1894) 1 Chanc. 209.)

The defendant formerly carried on business as a grocer under the style of 'T. P. Hancock.' His wife and her nephew K. assisted him in it. In 1886 he sold the business premises and the goodwill of the business to the plaintiff, and agreed 'not to carry on or be in anywise interested in' any similar business within five miles of the business premises during a period of ten years. In 1893 the defendant's wife wished to start K. in business, and she, contrary to the defendant's wishes, opened a grocer's shop within 200 yards of the plaintiff's shop, and carried on business there under the style of 'Mrs. T. P. Hancock.' The business was managed by K., and the defendant's wife took some part in it. The money used in this business was the separate property of the defendant's wife, and she received the takings. The defendant had no pecuniary interest in it. He assisted his wife in the negotiations for taking the lease of her shop, and he wrote out a circular which contained an invitation to 'old friends' to come to the shop, and referred to a tea formerly sold by him as 'Mrs. Hancock's Mixture.' After the shop had been opened he distributed copies of the circular to various persons, and introduced K. to provision merchants, and he was present at the bank when his wife opened an account in her own name.

Kekewich, J., held that the defendant was not 'interested in' the business within the meaning of the agreement, and that there had been no breach of the agreement by him.

The plaintiff appealed.

LINDLEY, L.J., and SMITH, L.J., were of opinion that the business was the business of the defendant's wife, and though he had assisted in the starting of it, he took no part in the management, and had no pecuniary interest in it; he was not, therefore, carrying on or interested in the business within the meaning of the

agreement, and the judgment appealed from must be affirmed.

KAY, L.J., was of opinion that defendant had by what he had done rendered active assistance in carrying on the new business, and that inasmuch as he and his wife were living together, and he would have the benefit of any profits which she might receive, it could not be said that he was not 'in anywise interested' in it. There had, therefore, been a breach of the agreement in both its branches.

Their Lordships dismissed the appeal, but, under the circumstances, without costs.

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### HIGH COURT OF JUSTICE.

LONDON, April 21, 1894.

[*Crown Case Reserved.*]

CORAM LORD COLERIDGE, C.J., HAWKINS, J., MATHEW, J.,  
CAVE, J., and GRANTHAM, J.

REGINA v. DYSON. (29 L.J., 263.)

*Criminal Law—Obtaining credit—Undischarged bankrupt—Intent to defraud—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 31—Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 18.*

This was a case stated by a Court of Quarter Sessions.

The prisoner had been indicted under section 31 of the Bankruptcy Act, 1883, for obtaining credit for 103*l.* whilst he was an undischarged bankrupt. The contention for the defence was that if he had obtained the credit without any intention to defraud he was entitled to an acquittal.

The Court of Quarter Sessions held that it was immaterial to consider whether the credit had been obtained with or without intent to defraud, and ruled that questions proposed to be put with a view of showing an absence of intent to defraud were inadmissible, and so directed the jury upon the question of fraudulent intent. The jury convicted the prisoner.

The question for the consideration of the Court was whether this ruling and direction were right or wrong.

The Court held that the ruling and direction were right, and that an undischarged bankrupt indicted for obtaining credit to the extent of 20*l.* and upwards contrary to section 31 could not show that the credit was obtained without intent to defraud.

Conviction affirmed.

LONDON, April 21, 1894.

[*Crown Case Reserved.*]

*Coram* LORD COLERIDGE, C.J., HAWKINS, J., MATHEW, J., CAVE, J.,  
and GRANTHAM, J.

REGINA v. BLABY. (29 L.J., 264.)

*Criminal law—Verdict and judgment—'Conviction'—Prisoner released upon recognisance to come up for judgment when called upon.*

This was a case stated by the Common Serjeant of London, before whom the prisoner had been tried for feloniously uttering counterfeit coin contrary to section 12 of 24 & 25 Vict. c. 99. The first part of the indictment charged that Alice Blaby, on January 11, 1894, uttered and put forth one piece of false and counterfeit coin, intended to resemble and pass for a florin, to one Emily Hutchinson, knowing it to be false and counterfeit. The second part charged that on April 23, 1888, the said Alice Blaby, in the name of Ellen Edwards, was convicted on an indictment for uttering a counterfeit half-crown to Ellen Dunn, and that she was thereupon ordered to find one surety in 20*l.* for her appearance to hear judgment when called upon. The prisoner was given in charge on the first part of the indictment, and pleaded 'Guilty.' She was then given in charge on the second part, which charged her with previous conviction. To this charge she pleaded 'Not Guilty.' A sergeant of police proved that the prisoner was the same woman as Ellen Edwards, convicted April 23, 1888, and procured a certificate of the conviction, which certified that 'Ellen Edwards was in due form of law convicted on a certain indictment, &c., . . . and was thereupon ordered to find one surety in the sum of 20*l.* for her appearance to hear judgment when called upon.' It was then submitted on behalf of the prisoner that there was no case to go to the jury, since to constitute a conviction there must have been both verdict and judgment. Here there was no judgment, only an order empowering the prisoner to be released on entering into a recognisance to come up for judgment. The learned Common Serjeant ruled, with some doubt, that there was a case for the consideration of the jury, leaving it to the Court to determine authoritatively what constituted a 'conviction.' The jury found the prisoner was the same person named in the certificate, and

judgment was respited, and the prisoner released on bail. The question was whether the prisoner could properly be convicted of felony.

The Court held that there had been a conviction on April 23, 1888, and that the prisoner could, upon the indictment on which she was charged with uttering counterfeit coin on January 11, 1894, be properly convicted of felony.

Conviction affirmed.

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LONDON, April 21, 1894.

[*Crown Case Reserved.*]

*Coram* LORD COLERIDGE, C.J., HAWKINS, J., MATHEW, J., CAVE, J.,  
and GRANTHAM, J.

REGINA v. SOWERBY. (29 L.J., 264.)

*Criminal law—Indictment—False pretences—Attempt to obtain moneys with intent to defraud.*

This was a case reserved by a Court of Quarter Sessions, the question being whether the following indictment was good and sufficient in law, and whether the prisoner was lawfully found guilty on such indictment: 'The jurors for our lady the Queen upon their oaths present that William Marr and Obadiah Blenkinsop, on September 28, A.D. 1893, were in the employ and service of the Butterknowle Colliery Company (Lim.), at the Quarry Pit of the Butterknowle Colliery, in the County of Durham, as hewers of coal, and were entitled to payment from their said employers of the sum of fivepence for every tub of coal wrought and filled by them; and the jurors aforesaid do further present that Joseph Sowerby, the younger, on the day and year aforesaid, unlawfully, knowingly, and designedly did, by placing a token upon a certain tub of coal in the said pit, falsely pretend that he, the said Joseph Sowerby the younger, had wrought and filled the said tub, by means of which false pretence he did unlawfully attempt to obtain the sum of fivepence, the moneys of the said Colliery Company (Lim.), with intent to defraud; whereas, in truth and in fact, the said Joseph Sowerby the younger had not wrought or filled the said tub of coal, as he then well knew, against the form,' &c.

Prisoner's counsel submitted that the indictment was bad, since (a) it was not stated to whom the false pretence was made; (b) it was not stated from whom the money was attempted to be obtained.

The jury found the prisoner guilty.

The Court held that the conviction must be quashed. There was no authority that an indictment could be held good that did not state the person to whom the false pretence was made. The old form should have been followed. No attempt could be made to supply averments which ought to have been in the indictment, but which were not there.

Conviction quashed.

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### CHANCERY DIVISION.

LONDON, April 19, 1894.

*Before STIRLING, J.*

**HARVEY v. HART.**

*Gaming—Partnership—Principal and Agent—Bets won by agent—Right of principal to recover—Collateral agreement—Account—Gaming Acts, 1845 (8 & 9 Vict. c. 109), 1892, (55 Vict. c. 9).*

The plaintiff and the defendant had entered into an agreement whereby the former was to pay certain sums of money to the defendant to be employed in making bets on horse-races, and the profits were to be divided. The plaintiff alleged that the defendant had received money under this agreement to part of which he (the plaintiff) was entitled, and took out a summons asking for an account. The defendant answered that the agreement was null and void under the Gaming Acts, 1845 (8 & 9 Vict. c. 109), and 1892 (55 Vict. c. 9), and he put in an account showing receipts to a considerable amount, but, on the other hand, payments and deductions which resulted in a debt due to him by the plaintiff.

STIRLING, J., said that the result of the agreement was to constitute a partnership between the plaintiff and the defendant, and that the betting part of the transaction was simply collateral. Therefore, as was said by Bowen, L.J., in *Bridger v. Savage*, 54 Law J. Rep. Q. B. 464; L. R. 15 Q. B. Div. 363, 'the contract under which he received the money for his principal is not affected by the collateral contract under which the money was paid to him.' The plaintiff asserted that the defendant, as his agent, the particular form of agency being a partnership, had received money for which he ought to account. The case was in-

distinguishable from *De Mattos v. Benjamin*, 63 Law J. Rep. Chanc. 248, and the plaintiff was entitled to the relief he sought. That he asked for an account instead of judgment was of no consequence; the only difference was in the machinery, not in the principle. The account would be of all sums come to the defendant under the agreement, and how they had been applied. Costs reserved.

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### ONTARIO DECISIONS.

#### *Sale of goods—Quantity—Description—"Car-load."*

The defendants agreed to buy from the plaintiff a "car-load of hogs" at a rate per pound, live weight. The plaintiff shipped a "double-decked" car-load and the defendants refused to accept this, contending that "a single-decked" car-load should have been shipped. There was conflicting evidence as to the meaning given in the trade to the term "car-load of hogs," and it was shown that the hogs were shipped sometimes in one way and sometimes in the other.

*Held*, Hagarty, C. J. O., dissenting, that the plaintiff had the option of loading the car in any way in which a car might be ordinarily or usually loaded, and that, he having elected to ship a double-decked car-load, the defendants were bound to accept. (Judgment of the County Court of Middlesex reversed.—*Hanley v. Canadian Packing Co.*, Court of Appeal, Feb. 26, 1894.)

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#### *Trial—Jury—Improper conduct of defendant—No objection taken at trial—Motion for new trial.*

During the trial of an action for libel the defendant published in his newspaper a sensational article in reference to the trial. The plaintiff's solicitor was aware that the article had come to the hands of one or more of the jury, but did not bring the matter to the notice of the Court, or take any action in respect thereto, and proceeded with the trial to its close. The jury brought in a verdict for the defendant. Upon a motion by the plaintiff to the Divisional Court for a new trial on the ground of improper conduct towards and the undue influence upon the jury:—

*Held*, that it was too late to take the objection, which should have been made at the trial.—*Tiffany v. McNee*, Chancery Division, Sept. 16, 1892.

*Evidence—Survey—Plan—Description.*

The description of a lot prepared for and used by the Crown Lands Department in framing the patent is admissible evidence to explain the metes and bounds of that lot.

The plan of survey of record in and adopted by the Crown Lands Department governs on a question of location of a road, when the surveyor's field notes do not conflict with the plan and no road has been laid out on the ground. (Judgment of the Common Pleas Division reversed).—*Kenny v. Caldwell*, Court of Appeal, Feb. 26, 1894.

*RAILWAY DECISIONS.*

*Railway company—Broken gate—Liability for horses killed on railway—Negligence—Owner of horses not owner of adjoining land—Horses on land without permission.*

Appeal by the defendants from the decision of Dubuc, J.

From the evidence it appeared that the plaintiff from time to time obtained permission from his father to pasture stock on the land of the latter. But that permission was only temporary, not permanent. The plaintiff stated that he had had stock at his father's the previous winters by arrangement, showing that any permission was temporary and just renewed from time to time. There was no evidence to warrant the finding of the jury that the animals were on the land of Matthew Ferris by his permission. Unless they were so, the plaintiff could not recover against the defendants.

*Held*, it was not enough for the plaintiff, to entitle him to claim the benefit of s.s. 3 of s. 194 of the Railway Act, 51 Vic., c. 99, as amended by 53 Vic., c. 28, s. 2, to show merely, that the owner of the adjoining land from which his animals got upon the track would not have objected to their being on his land, and would not have treated them as trespassing, had he known they were there. He must go further than this. He must adduce evidence from which it can be reasonably found or inferred that the animals were on the adjoining land with the prior leave and consent of the owner, and under such circumstances that the owner could not say they were there unlawfully and trespassing. As there was not any evidence upon which a jury as reasonable men might find a verdict for the plaintiff, a non-suit should be entered.—*Ferris v. Canadian Pacific Railway Co.*, Queen's Bench, Manitoba, March 10, 1894.

## PARTNERSHIP IN CRIME.

Reference has often been made to a suit (real or imaginary) at the instance of a highwayman against his partner in business to recover a share of profits. The doubt, frequently expressed, as to whether such an action was ever brought into court has now been set at rest by Sir Frederick Pollock and Mr. Hubert Hall of the Record Office. Hitherto the authenticity of the story has rested on the report contained in the *European Magazine* for May, 1787, vol. I, 360, which, under the title of *Everet v. Williams*, is quoted at length by W. D. Evans in the appendix to his translation of Pothier on Obligations, published in 1806 (vol. II, 3.) We are told by Evans that Lord Kenyon, in *Ridley v. Moore*, 1797 (appendix to Clifford's Report of Southwark Election), referred to this case of *Everet v. Williams* as an actual one, but that on examining the [Record] Office, he (Evans) had not found it supported, and had therefore treated it as a supposititious illustration of a general principle applicable to illegal contracts. Lindley, in his work on Partnership (5th ed., p. 93), gives a short report of the case abridged from Evans, but states "there is some doubt whether it actually occurred. Real or fictitious, it is," he says, "a good illustration of an illegal partnership of the class in question." Pollock, in his work on Contracts (5th ed., p. 263, note), refers to the matter thus: "Lord Kenyon once said, by way of illustration it appears, that he would not sit to take an account between two robbers on Hounslow Heath. May not the legend have arisen from this? The case was cited with apparent gravity by Jessel, M. R., in *Sykes v. Beadon*, 1879, 11 Ch. D. 170, at page 195." The suggestion here made that Lord Kenyon started the story is disproved by the dates, for Lord Kenyon spoke in 1797, while the *European Magazine* report appeared ten years earlier. So recently as April last Sir Frederick Pollock was sceptical. As editor of the *Law Quarterly* he says: "We still decline to believe the story, and can only suppose it took rise from some otherwise forgotten jest or hoax in an equity draftsman's chambers." But in the current number of the *Law Quarterly* Sir Frederick is obliged to admit that "truth is stranger than fiction." The dates of the orders following on the bill are given by the *European Magazine* and by Evans; but although the search of the latter in the Record Office did not result in the discovery of the originals, these have now been found by Mr. Hall, and are substantially

in the terms published in 1787. The orders being accurate, it is no more than a fair inference that the terms of the bill itself are those given by the *European Magazine*. For the details of the case we must refer our readers to Evans as above cited, or to the current *Law Quarterly Review* (vol. XXXV, 197). The following brief summary will however be of some interest: It appears that in 1725 one Joseph Everet, of the parish of St. James's, Clerkenwell, sued Joseph Williams in the equity side of the Exchequer Court. The bill recites an oral partnership between the defendant and the plaintiff, who was "skilled in dealing in several sorts of commodities," and that the parties had "proceeded jointly in the said dealings with good success on Hounslow Heath, Finchley, Blackheath, and other places," where they had dealt with several gentlemen for "divers watches, rings, swords, canes, hats, cloaks, horses, bridles, saddles, and other things," which were had for little or no money after "some small discourse" with the owners. The rest of the bill is in the ordinary form of a partnership account, the bill itself being signed by one Jonathan Collins as counsel. The court seems to have considered itself the victim, along with the defendant, of a practical joke, for on the 30th of October, 1725, upon the motion of the defendant's counsel, the matter was referred to the deputy remembrancer "for scandal and impertinence," with instructions to him to report with all convenient speed. On the 29th of November it was ordered "that a messenger or tipstaff of this court do forthwith go and attach the bodies of Mr. William White and Mr. William Wreathock, the plaintiff's solicitors, and bring them into court to answer the contempt of this court." In the end White and Wreathock were each fined £50, and committed to the custody of the warden of the fleet until their fines were paid. Collins, the plaintiff's counsel, was ordered to pay the defendant such costs as the deputy should tax. The defendant, although absolved from any connection with this hoax, does not appear to have been a spotless character, for according to the *European Magazine*, he was hanged at Maidstone in 1727. The plaintiff was hanged at Tyburn in 1730; while Wreathock, one of the plaintiff's solicitors, was in 1735 convicted of robbing Dr. Lancaster, but was reprieved and transported.—*Scottish Law Review*.

**PAYMENT OF DIVIDENDS BY COMPANY.**

The decision of the Court of Appeal in *Verney v. The General and Commercial Investment Trust (Lim.)* is one that may readily give rise to misapprehension unless its scope and effects are clearly grasped. The action was a friendly one, brought with a view to obtain the opinion of the Courts on the question whether—there being an excess of the receipts over the expenditure of an investment company—the directors might lawfully declare a dividend although the market value of the investments had depreciated. Mr. Justice Stirling and the Court of Appeal answered this question in the affirmative. The following points deserve notice: (1) The particular decision in this case turned upon the peculiar constitution of the company in question. It was not an ordinary trading concern. It was not a sharebroking company. It was purely and simply a company for dealing with investments, and its memorandum and articles of association, in the view of the Courts, showed that the transaction was a division of profits, and not a return of capital under the guise of such a division. (2) While holding that the declaration of the proposed dividend was legal, the Courts did not express any opinion as to commercial prudence or propriety. (3) The general effect of the decision, taken in conjunction with such cases as *Lee v. The Neu-châte Asphalte Company*, is to establish the proposition that there is nothing in the Companies Acts to declare illegal under all circumstances the declaration of a dividend on an excess of profits over expenditure, although there has been a depreciation of capital. These Acts are substantially silent on the question of payment of dividends, and so long as there is no insolvency, and the receipts exceed the expenses of management, the matter is left by the Legislature, as one of commercial prudence, to the business instincts of shareholders and directors.—*Law Journal*.

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**JUDGES' WILLS.**

It is related of Serjeant Maynard, who flourished as a 'black-letter lawyer' in the days of William III, that he deliberately worded his will in ambiguous terms, so that several legal questions which had vexed him in his lifetime might be settled in Court after he was dead. It is abundantly clear that this disinterested notion was not entertained by Sir James Stephen in the disposition of his wealth. 'This is my last will. I give all my property to my wife, whom I appoint sole executrix.' No testa-

mentary disposition could be much simpler. The will is the shortest a judge has ever been known to make. The occupant of the Bench who most closely approached Sir James Stephen in his testamentary conciseness was Lord Mansfield, who wrote his will on half a sheet of note paper. This economy of labour and space was all the more remarkable because the testator disposed of property of the value of half a million pounds. Having provided for a few specific legacies to friends, he gave the residue of his possessions to his nephew in these unusual terms: 'Those who are dearest and nearest to me best know how to manage and improve, and ultimately, in their turn, to divide and subdivide the good things of this world, which I commit to their care, according to events and contingencies which it is impossible for me to foresee or trace through all the mazy labyrinths of time and chance.' In striking contrast to the shortness and directness of Sir James Stephen's testament are the prolixity and eloquence of a judge who enjoyed a large measure of fame in the seventeenth century. This is the rhetorical fashion in which the Earl of Dorset, who succeeded Lord Burleigh in the office of Lord Treasurer, gave a very simple gift to his wife: 'I bequeath to Cecilie, Countess of Dorset, my most virtuous, faithful, and dearly-loved wife, not as any recompense of her infinite merit towards me, who for incomparable love, zeal, and hearty affection ever showed unto me, and for those her so rare, reverent, and many virtues of charity, modesty, fidelity, humility, secrecy, wisdom, patience, and a mind replete with all piety and goodness, which evermore shall and do abound in her, deserveth to be honoured, loved, and esteemed above all the transitory wealth and treasure of this world, and therefore by no price of earthly riches can by me be valued, recompensed, or requited; to her, therefore, my most virtuous, faithful, and entirely loved wife—not, as I say, as a recompense, but as a true token and testimony of my unspeakable love, affection, estimation, and reverence, long since fixed and settled in my heart and soul towards her, I give, etc.' Such manifestations of personal feeling, in which it was once the custom of testators to indulge, have now almost disappeared from wills. They are occasionally to be found in the testamentary productions of persons who dispense with professional assistance; but, as a rule, even home-made wills consist of what those who make them are pleased to regard as business-like statements of their wishes. Judges rarely draw their own wills. They

know too well the truth of Lord St. Leonards' words: 'It is quite shocking to reflect upon the litigation which has been occasioned by men making their own wills.' It is a remarkable fact that the very man who wrote these words committed the error he condemned. Lord St. Leonards is the only Lord Chancellor whose will has been the immediate subject of litigation. It was not, however, on account of the obscurity of its phraseology, but because of its disappearance, that the will acquired the notoriety it possesses. It was understood that the distinguished jurist, who died in 1875 at the advanced age of ninety-four, had spent not a small part of his latter years in making an equitable disposition of his wealth, and it was known that he kept the precious document in a box. At his death the carefully prepared will was missing, and the most diligent search failed to discover it. His daughter, who had often perused it in his presence, was fully acquainted with its provisions, and Sir James Hannen, with the subsequent approval of the Court of Appeal, allowed her to give evidence as to its contents. It was decided that the contents of a lost will may be proved by the evidence of a single witness, though interested, whose veracity and competence are unimpeachable, and that when the contents of a lost will are not completely proved probate will be granted to the extent to which they are proved. At the conclusion of his judgment the President of the Probate, Divorce, and Admiralty Division pointed the moral of this extraordinary case by directing the attention of the public to the fact that the Legislature had provided a remedy for the secure custody of wills. 20 & 21 Vic., c. 77, s. 91, provides that upon the payment of a small fee the wills of living persons may be deposited at the registry of the Probate Court. Anybody who so deposits his will is quite free to alter it, but the system has, for some reason not apparent, failed to commend itself to the public, and the 'convenient depositories' established by the Act have been allowed to disappear from among the practical things of life.—*Law Journal* (London).

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#### GENERAL NOTES.

**THE IMPRISONMENT OF CHILDREN.**—On March 7, a child of seven was confined in Holloway Prison by order of justices of the Bromley Petty Sessional Division of Kent. The imprisonment was on remand only, on a charge of stealing lead, and the

child was, in fact, detained in the prison infirmary, and the matter at once reported to the Home Office, which on March 8 requested the justice to release the child on his father's recognisances, which was done. A question on the subject was asked in the House of Commons, and in answer the Home Secretary stated that it had been pointed out that a child of seven was quite unfit for detention in prison, and he had directed a police officer to go bail for the child in question if no one else could be found. Such imprisonment is clearly inconsistent with modern notions, with the Home Office circular of 1880, and with the provisions of the Reformatory Schools Act of 1893.—*Law Journal*.

**CURIOUS ACTION AGAINST A MEMBER OF PARLIAMENT.**—In the City of London Court, before Mr. Julian Robins, deputy judge, an action was brought by Alexander Chaffers against Sir Reginald Hanson as M.P. for the City of London, to recover nominal damages for refusing to present a petition to the House of Commons praying for the removal of Lord Esher from his position as Master of the Rolls. The plaintiff stated that, as one of the constituents of the city, he claimed the right to petition Parliament through his member to redress a grievance which could only be removed by the House of Commons. Lord Farnborough had laid down certain principles which showed that the plaintiff was justified in bringing this action. His right to petition Parliament affects the fundamental principles of the Constitution of this country. In his petition he charged Lord Esher with being a false and deliberate liar, and having committed a misdemeanour of the deepest malignity.—The deputy judge: You must not talk like that.—The plaintiff: I have a right to. I can prove it, and I will state it in every court that I can get into. Lord Esher is a common liar!—The deputy judge: I shall not allow you to stay here if you talk like that.—The plaintiff: Several important members of the House have said that my petition ought to be presented. I sent it to Lord Herschell, but he returned it saying that he could not do anything in the matter having regard to his lordship's position.—The deputy judge: Why not take it to Mr. John Burns?—The plaintiff: I took it to Mr. Keir Hardie and he said, 'Go to your own representative.'—The deputy judge: He wanted to shift the responsibility. I must hold that there is no jurisdiction and that no cause of action will lie. Judgment must, therefore, be entered for the defendant. There are 670 other members to whom you can go.

# THE LEGAL NEWS.

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VOL. XVII.

JUNE 1st, 1894.

No. 11.

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## *THE LATE CHIEF JUSTICE JOHNSON.*

"There is one event unto all." Four times within the space of three years have the bench and bar of this province had to mourn the death of a Chief Justice. Sir Antoine A. Dorion, Chief Justice of the Court of Queen's Bench, died 31 May, 1891; Sir Francis G. Johnson, Chief Justice of the Superior Court, died 27 May, 1894. Between these dates Sir Andrew Stuart and Sir William C. Meredith, ex-Chief Justices of the Superior Court; passed away. Add to these Sir John J. C. Abbott, an ex-premier, and the Hon. R. Laflamme, an ex-minister of justice of the Dominion, both of the Montreal bar, and one is forced to realize the immense gap that has been left in the ranks of the elders.

The friends of Sir Francis Johnson have been reluctantly compelled for some weeks past to recognize the fact that his illness could end in but one way. His naturally fine constitution was greatly weakened by a severe attack of influenza in the beginning of 1893, which kept him a prisoner to his house for four months; and although he rallied surprisingly during the summer, he had not sufficient strength to withstand, in his seventy-eighth year, a recurrence of the malady last December.

After a struggle which has lasted five months the end has come.

The deceased for nearly sixty years has been such a conspicuous figure in legal circles that it is hardly necessary at this time or in this place to advert at any length to his career. As an advocate he won his greatest successes before juries, and in the criminal courts. In his younger days he was not pre-eminent in the ordinary practice of the civil courts. The routine of office work did not suit him. But as crown prosecutor he appeared to great advantage, and perhaps never in the history of the province has the Crown been represented with greater dignity and decorum than during his term of office. At a comparatively early age he was elevated to the bench. At first, apparently, his success was not great. He was appointed to a country district, (Bedford) and his decisions were frequently taken to Review and overruled. Which court was right we do not pretend to say. But from the date of his transfer to the bench of this district, now more than twenty-two years ago, a marked increase of reputation came to him. He acquitted himself so well as to surprise even those who were acquainted with his powers. Judge Johnson in that period undoubtedly worked very hard, and in this labor he was stimulated by the high respect which he always entertained for the judicial office. When he took his seat on the bench all men knew that justice would be administered fearlessly and independently. We have heard it stated that he was severe in his demeanor on the bench. He was severe in his denunciation of everything savoring of chicanery, and he was stern where he perceived trifling or inadequate preparation of cases on the part of counsel. But he had a ready and generous appreciation of honest effort, and an admiration of professional efficiency. He had a reverence for the judicial office and a high regard for the profession of advocacy, and he resented and scorned all that tended to degrade one or the other. He was far from

ostentatious in the manifestation of sympathies, but so far as they are compatible with the judicial office, they were always on the side of justice and fair play.

The sincere regret manifested at the large meeting held at Montreal on the 29th May, presided over by the *bâtonnier* Mr. John Dunlop, Q. C., showed that the bar of this section were not unmindful of his sterling qualities, nor ignorant of their own great loss. Mr. St. Pierre, Q. C., aptly bore testimony to the mental youth and vigour which the Chief Justice, like many great lawyers, retained even to his latest days. We have been proud of our Chief Justice, and with good reason. He was a master of the art of clothing bold and striking conceptions in graceful and polished language. On or off the bench, he was ever felicitous in phrase, and his written judgments often reflect his wit and rhetorical power. There have been minds of more strictly legal cast among our judges, but it is hardly probable that we shall soon see amongst us so great a master of judicial eloquence.

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### THE MAY APPEAL TERM.

The January term of the Court of Appeal at Montreal, opened with 99 cases on the list. On the 22nd of May the last of these cases was reached in ordinary course, and on the 25th of May the last Montreal case on the March list was also disposed of. Several appeals from judgments rendered in 1894 were heard in their ordinary turn. There remain, therefore, of the appeals taken up to March, only a few cases passed over at the request of counsel, and a few country appeals. The number of new appeals taken between March and May was only 12. Practically, therefore, there are no arrears in this court, and the September list will hardly exceed fifty. At present an appeal to this court is as expeditious as a resort to the Court of Review.

## SUPREME COURT OF CANADA.

OTTAWA, February 20, 1894.

THE QUEEN v. CIMON.

Quebec.]

*Petition of Right*—46 Vict. c. 27 (P.Q.)—*Contract*—*Final certificate of the engineer*—*Extras*—*Practice as to plea in bar not set up.*

A contract entered into between Her Majesty the Queen in right of the Province of Quebec and F. X. Cimon, Esq., for the construction of three of the departmental buildings at Quebec contained the usual clauses that the balance of the contract price was not payable until a final certificate by the engineer in charge was delivered showing the total amount of work done, and materials furnished and the cost of extras and the reduction in the contract price upon any alterations. There was a clause providing for the final decision by the Commissioner of Public Works in matters in dispute upon the taking over or settling for the works. The Commissioner of Public Works, after hearing the parties, gave his decision that nothing was due to the contractors, and the engineer in charge by his final certificate, declared that a balance of \$31.36 was due upon the contract price, and \$42.84 on extras.

The suppliants by their petition of right claimed *inter alia* \$70,000 due on extras. The Crown pleaded general denial and payment.

The Superior Court granted the suppliant \$74.20, the amount declared to be due under the final certificate of the engineer. On appeal the Court of Queen's Bench for Lower Canada (Appeal side) increased the amount to \$13,198.77, interest and costs.

*Held*, reversing the judgment of the Court *à quo* and restoring the judgment of the Superior Court, that the suppliants are bound by the final certificate given by the engineer under the terms of the contract. *Guilbault v. McGreevy* (18 Can. S. C. R. 609).

*Per* Fournier and Taschereau, JJ., dissenting, that as the non-production of the final certificate had not been set up in the pleadings as a bar to the action, and there was an admission of record by the Crown that the contractor was entitled to 20 per cent. commission on extras ordered and received, the evidence

fully justified the finding of the Court of Queen's Bench that the commission of 20 per cent. was still due and unpaid on \$65,837.09 of said extra work.

Appeal allowed with costs.

*G. Stuart, Q.C.*, for appellant.

*G. Amyot, Q.C.*, for respondent.

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20 February, 1894.

BAPTIST v. BAPTIST.

Quebec.]

*Will—Testamentary capacity—Senile dementia—Undue influence*  
—Art. 831, C. C.

In 1889 an action was brought by G. H. H. in capacity of curator to Mrs. B. an interdict, against A., in order to have certain deeds of transfer made to him by Mrs. B., his mother, set aside and cancelled. Mrs. B. having died before the case was brought on to trial, the respondent M.B., presented a petition for continuance of the suit on her behalf as one of the legatees of her mother under a will dated the 17th November, 1869. This petition was contested by A.B. who based his contestation on a will dated the 17th January, 1885 (the same date as that of the transfer attacked by the original), whereby the late Mrs. B. bequeathed the residue of all her property, etc., to her two sons. Upon the merits of the contestation as to the validity of the will of the 17th January, 1885,

*Held*, affirming the judgment of the Court below, (R.J.Q., 1 B R. 447.) 1o that art. 831, C. C., which enacts that the testator must be of sound mind, does not declare null only the will of an insane person, but also the will of all those whose weakness of mind does not allow them to comprehend the effect and consequences of the act which they perform; 2o that upon the facts and evidence in the case which appeared in the judgments (see also 21 Can. S.C.R. 427) the will of the 17th January, 1885, was obtained by A. B. at a time when Mrs. B. was suffering from senile dementia, and weakness of mind, and was under the undue influence of A. B., and should be set aside.

Appeal dismissed with costs.

*Stuart, Q.C.*, and *Olivier*, for appellant.

*Laflamme, Q.C.*, and *Laflaur*, for respondent.

20 Feb. 1894.

## VIRGO v. CITY OF TORONTO.

Ontario.]

*Municipal corporation—By-law—Power to “license, regulate and govern” trade—Partial prohibition—Discrimination—Repugnancy.*

By a by-law of the City of Toronto, hawkers, petty chapmen and other small traders were prohibited from pursuing their respective callings on certain streets comprising the principal business part of the city, and covering an area of about ten miles.

*Held*, that the authority given to municipal councils by sec. 495 (3) of the Municipal Act to license, regulate and govern trades, did not empower the city council to pass this by-law, which was, therefore, *ultra vires*. Judgment of the Court of Appeal (20 Ont. App. R. 435) reversed, Fournier and Taschereau, JJ., dissenting.

A by-law of the city council provided that hawkers and peddlers of fish, etc., and small wares that could be carried in a hand basket, should not be required to take out a license.

*Held*, that a subsequent by-law fixing the license fee for hawkers and peddlers of fish was not void for repugnancy. Judgment of the Court of Appeal affirmed, Gwynne and Sedgewick, JJ., dissenting.

*Du Vernet* for the appellants.

*Mowat* for the respondents.

20 Feb., 1894.

## NIXON v. THE QUEEN INSURANCE Co.

Nova Scotia.]

*Fire insurance—Condition of policy—Particular account of loss—Failure to furnish—Finding of jury—Evidence.*

A policy of insurance against fire required that in case of loss the insured should, within fourteen days, furnish as particular an account of the property destroyed, etc. as the nature and circumstances of the case would admit of. The property of N., insured by this policy, was destroyed by fire and in lieu of the required account he delivered to the agent of the insurers an affidavit in which, after stating the general character of the property insured, he swore that his invoice book had been burned and he had no adequate means of estimating the exact amount of

his loss, but that he had made as careful an estimate as the nature and circumstances of the case would admit of, and found the loss to be between \$3,000 and \$4,000.

An action on the policy was defended on the ground of non-compliance with said condition. On the trial the jury answered all the questions submitted to them, except two, in favour of N. These two questions, whether or not N. could have made a tolerably complete list of the contents of his store immediately before the fire, and whether or not he delivered as particular an account etc. (as in the conditions), were not answered. The trial judge gave judgment in favour of N. which the court en banc reversed and ordered judgment to be entered for the company.

*Held*, affirming the decision of the Court en banc (25 N. S. Rep. 317), that as the evidence conclusively showed that N., with the assistance of his clerk, could have made a tolerably correct list of the goods lost, the condition was not complied with.

*Held*, further, that as under the evidence the jury could not have answered the questions they refused to answer in favour of N., a new trial was unnecessary and judgment was properly entered for the company.

Appeal dismissed with costs.

*Borden, Q.C.*, for the appellant.

*Harrington, Q.C.*, and *Mellish* for the respondents.

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20th Feb., 1894.

SALTERIO V. CITY OF LONDON FIRE INS. CO.

Nova Scotia.]

*Fire insurance—Condition against assigning policy—Breach of condition.*

A condition in a policy of insurance against fire, provided that if the policy or any interest therein should be assigned, parted with or in any way encumbered the insurance should be absolutely void, unless the consent of the company thereto was obtained and indorsed on the policy. S., the insured under said policy, assigned by way of chattel mortgage, all the property insured and all policies of insurance thereon, and all renewals thereof to a creditor. At the time of such assignment S. had

other insurance on said property, the policies of which did not prohibit their assignment. The consent of the company to the transfer was not obtained and indorsed on the policy.

*Held*, affirming the decision of the Supreme Court of Nova Scotia, that the mortgage of the policy by S. without such consent made it void and he could not recover the amount insured in case of loss.

Appeal dismissed with costs.

*Harrington, Q.C.*, for the appellant.

*Newcombe, Q.C.*, for the respondents.

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20th Feb., 1894.

FRASER V. FAIRBANKS.

Nova Scotia.]

*Sale of land—Sale subject to mortgage—Indemnity of vendor—  
Special agreement—Purchaser trustee for third party.*

L. F. agreed in writing to sell land to C. F. and others, subject to mortgages thereon, C. F. to hold same in trust to pay half the proceeds to L. F., and the other half to himself and associates. When the agreement was made it was understood that a company was to be formed to take the property, and before the transaction was completed such company was incorporated and L. F. became a member receiving stock as part of the consideration for his transfer. C. F. filed a declaration that he held the property in trust for the company, but gave no formal conveyance. An action having been brought against L. F. to recover interest due on a mortgage against the property, C. F. was brought in as third party to indemnify L. F., his vendor, against a judgment in said action.

*Held*, reversing the decision of the Supreme Court of Nova Scotia, Taschereau and King, JJ., dissenting, that from the evidence it appeared that the original agreement contemplated the sale being to the company and not to C. F., and the latter was not liable to indemnify the vendor.

Appeal allowed with costs.

*Borden, Q.C.*, for the appellant.

*Harris, Q.C.*, for the respondent.

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20th Feb., 1894.

## PARKS v. CAHOON.

Nova Scotia.]

*Title to land—Disseisin—Adverse possession—Paper title—Joint possession—Statute of limitations.*

A deed executed in 1856 purported to convey land partly in Lunenburg and partly in Queen's County, N.S., of which the grantor had been in possession up to 1850 when C. entered upon the portion in Lunenburg county, which he occupied until his death in 1888. The grantee under the deed never entered upon any part of the land and in 1866 he conveyed the whole to a son of C., then about 24 years old who had resided with C. from the time he took possession. Both deeds were registered in Queen's. The son shortly after married and went to live on the Queen's county portion. He died in 1872 and his widow after living with C. for a time, married P., and went back to Queen's county. P. worked on the Lunenburg land with C. for a few years when a dispute arose and he left. C., afterwards and by an intermediate deed, conveyed the land in Lunenburg county to his wife.

On one occasion P. sent a cow upon the land in Lunenburg county which was driven off, and no other act of ownership on that portion of the land was attempted until 1890, after C. had died, when P. entered upon the land and cut and carried away hay. In an action of trespass by C's widow for such entry the title to the land was not traced back beyond the deed executed in 1856.

*Held*, affirming the decision of the Supreme Court of Nova Scotia (25 N. S. Rep. 1) that C's son not having a clear documentary title his possession of the land was limited to such part as was proved to be in his actual possession and in that of those claiming through him; that neither he nor his successor in title ever had actual possession of the land in Lunenburg county; and that the possession of C. was never interfered with by the deeds executed, and having continued for more than twenty years he had a title to the land in Lunenburg county by prescription.

Appeal dismissed with costs.

*McInnes*, for the appellant.

*Borden, Q.C.*, for the respondent.

20th Feb., 1894.

MORSE v. PHINNEY.

Nova Scotia.]

*Chattel mortgage—Affidavit of bona fides—Compliance with statutory form—R.S.N.S. 5th ser., c. 92, s. 4.*

By R.S.N.S., 5th ser., c. 92, s. 4, every chattel mortgage must be accompanied by an affidavit of *bona fides* "as nearly as may be" in the form given in a schedule to the act. The form of the jurat to such affidavit in the schedule is: "Sworn to at.....in the county of....., this.....day of.....A.D.....

Before me....., a commissioner," etc.

*Held*, reversing the judgment of the Supreme Court of Nova Scotia, Gwynne, J., dissenting, that where the jurat to an affidavit was "sworn to at Middleton this 6th day of July, 1891," etc., without naming the county, it avoided the mortgage, notwithstanding the affidavit was headed "in the county of Annapolis," and that the defect was not cured by ch. 1, sec. 11 of the same series, providing that where forms are prescribed, slight deviations from forms, not affecting the substance nor calculated to mislead, shall not vitiate them. *Archibald v. Hubley* (18 Can. S.C.R. 116) followed; *Smith v. McLean* (21 Can. S.C.R. 355) distinguished.

Appeal allowed with costs.

*Borden, Q.C.*, for the appellant.

*Harrington, Q.C.*, for the respondent.

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#### COURT OF APPEAL.

LONDON, May 8, 1894.

*Before* LINDLEY, L.J., LOPES, L.J., KAY, L.J.

LEMMON v. WEBB (29 L.J. 295.)

*Nuisance—Abatement—Overhanging trees—Right of adjoining owner to cut—Notice, whether necessary.*

Appeal from a decision of Kekewich, J.

The plaintiff and defendant were adjoining landowners. The branches of some old trees situated on the plaintiff's land projected over the defendant's land. The defendant cut off so much of the branches as projected over his land, without going on to

the plaintiff's land and without previously giving notice to the plaintiff. The plaintiff brought an action for an injunction and damages. Kekewich, J., held that the cutting without notice was not justifiable except in a case of emergency, and he gave judgment for the plaintiff for 5*l.* and costs.

The defendant appealed.

Their Lordships allowed the appeal. The law was thus laid down by Lindley, L.J.: "The owner of a tree has no right to prevent a person lawfully in possession of land into or over which its roots or branches have grown from cutting away so much of them as projects into or over his land, and the owner of a tree is not entitled to notice unless his land is entered in order to effect such cutting. However old the roots or branches may be, they may be cut without notice, subject to the same condition. The right of an owner or occupier of land to free it from such obstructions is not restricted by the necessity of giving notice so long as he confines himself and his operations to his own land, including the space vertically above and below the surface."

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#### CHANCERY DIVISION.

LONDON, April 27, 1894.

*Before* KEKEWICH, J.

*In re* BIRD. BIRD *v.* CROSS.

*Will—Condition—Non-fulfilment—Lunacy—Act of God.*

A testator bequeathed to his son John one fifth of his residuary estate, "but in case my said son John shall not within three years of the date of my death return to England and personally appear before the trustees of this my will, and identify himself to them to their satisfaction," then the testator gave the said share to other persons. At the date of the death of the testator his son John was a lunatic, with occasional lucid intervals, and confined in a lunatic asylum in Sydney, New South Wales; and in consequence of his lunacy he had failed to perform the condition.

Kekewich, J., held that the lunacy was an act of God, rendering the performance of the condition impossible by the lunatic, and that, the condition being subsequent, he was entitled to the one-fifth share of the testator's estate.

*COLONIAL JURISDICTION OVER RESIDENTS IN  
ENGLAND.*

The case of *Ashbury v. Ellis*, decided last year by the Judicial Committee of the Privy Council (62 Law J. Rep. 107; L. R. (1893) A. C. 339), opens up a rather disturbing prospect of possible eccentricities of colonial legislation. The question at issue was substantially whether the New Zealand Legislature was entitled to pass laws enabling the local tribunals to issue judgment against an Englishman resident in England who had no notice of the process. The Judicial Committee decided that such a law was not outside the powers of the New Zealand Legislature as defined by the Imperial statute 15 and 16 Vict., c. 72. They wisely refrain, however, from expressing any opinion on the international validity of a judgment so obtained. The facts of the case were as follows. The appellant was domiciled in England. He was not, at the time the actions were commenced, present either in person or by agent in the colony, and had not been there since December, 1886, when he paid a short visit, and never had a permanent residence there. At the time the writs were issued he was resident in London. He was sued in New Zealand on bills of exchange indorsed by his agent some years ago. The Judicial Committee base their decision on the interpretation they give to the Act of Parliament (15 and 16 Vict., c. 72), which gives to the Legislature of New Zealand power "to make laws for the general order and good government of New Zealand, provided that no such laws be repugnant to the laws of England." The Judicial Committee hold that laws authorizing judicial proceedings against absentees are not repugnant to the laws of England. "In fact, they are framed on principles adopted in England." It will be sufficient to cite the rule in question to show how far this statement is borne out by facts. The rule is as follows: "In actions founded on any contract made or entered into, or wholly or in part to be performed within the colony, on proof that any defendant is absent from the colony at the time of the issuing of the writ, and that he is likely to continue absent, and that he has no attorney or agent in the colony known to the plaintiff who will accept service, the Court may give leave to the plaintiff to issue a writ and proceed thereon without service." (New Zealand Code, 46 Vict., No. 29.)

It is difficult to see how it is to be shown that the principles of this rule have been adopted in England. It is true that, in cer-

tain cases, process is allowed against residents abroad, but it is fenced round with many restrictions, and the Courts have expressly declared that in framing the rules regard has been had to the limits of jurisdiction under international law, and to proved remonstrances of foreign governments, who resent an unjustifiable assumption of jurisdiction over their subjects. And, furthermore, in the interpretation as well as in the framing of rules of procedure, English Courts keep steadily in view the limits of international jurisdiction. In the recent case of *The St. Gobain Channery & Cirey Company v. Hoyeremann's Agency*, 62 Law J. Rep. 485; L. R. (1893) C. A. 96 (Lord Esher, M.R., and Mr. Justice Smith), the true rule of interpretation is laid down by Lord Esher: "The words 'any person carrying on business within the jurisdiction in a name or style other than his own name' are large enough to include a foreigner resident abroad, and to include one who has never been in England in his life, and has never had the protection of English law, and is merely carrying on business by his agents in England. But the question is, Ought the Court so to construe those words as to include such a person? If the rule had contained words expressly in terms including a foreigner resident abroad, then the Court would have been bound to obey the directions of its own legislature: but when the words used are capable of one or other construction, then the Court ought to adopt the construction which will prevent an infringement upon the principles of international law." English Courts have protested against the French Civil Code (art. 14), which contains a claim to issue judgments against foreigners abroad under precisely analogous circumstances to those contemplated by the New Zealand Act. (See *Schibsley v. Westenholz*, 40 Law J. Rep. Q. B. 73.) Such a claim is rightly regarded by English and other Courts as based on a usurpation of jurisdiction, and judgments of the kind cannot be enforced in England.

It is to be regretted, therefore, that the interpretation of the Judicial Committee of the statute conferring power on the New Zealand Legislature should have opened the door to so wide an abuse of authority. The matter is now beyond any remedy except that through legislation of the Imperial Parliament. Except, indeed, that if New Zealand judgments of the kind are brought here for enforcement, no ordinary Courts will have an opportunity of expressing an opinion on their validity. The Judicial Committee apparently anticipate this: "It was said that a judg-

ment so obtained could not be enforced beyond the limits of New Zealand, and several cases of suits founded on foreign judgments were cited. Their lordships only refer to this argument to say that it is not relevant to the present issue. When a judgment of any tribunal comes to be enforced in another country, its effects will be judged of by the Courts of that country with regard to all the circumstances of the case." Among such circumstances, English Courts have always placed the validity of the claim to jurisdiction under international law. Meanwhile, it is to be hoped that the more sober-minded of colonial legislatures will not too hastily enter on the path of assuming jurisdiction over Englishmen resident in England. New Zealand seems a land for experiments in legislation—from women's franchise to jurisdiction over the world in general.—*Law Journal (London)*.

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#### CHIEF JUSTICE JOHNSON.

Sir Francis Godschall Johnson, Knight, Chief Justice of the Superior Court of Quebec, died May 27, 1894, in the 78th year of his age. He was born at Oakley House, Bedfordshire, England, on the 1st of January, 1817. His father, Godschall Johnson, was an officer in the 10th Royal Hussars, afterwards British consul-general in Belgium, and his mother a daughter of Sir Cecil Bisshopp, and sister of Col. Cecil Bisshopp, who lost his life on the Niagara frontier during the war of 1812-14. The deceased judge was educated at St. Omer, France, and at Bruges, Belgium. He came to Canada in 1835, and entered upon the study of the law in the office of the late Mr. Justice Day. He was called to the Bar in 1839, and began the practice of his profession in Montreal. In 1846, before he was thirty years of age, he was appointed a Q. C. In 1854 he was appointed Recorder of Rupert's Land and Governor of Assiniboia, with a residence at Fort Garry. In 1858 he returned to Montreal, and resumed the practice of the law. For some years he represented the Crown in the Montreal district. In 1865 he was elevated to the Superior Court bench. In 1870 he was again sent to the Red River district, and assisted in the establishment of a regular government and the organization of a judicial system in the Province of Manitoba. He also served as commissioner in hearing and determining claims for losses during the first Riel rising. In 1872 he was named Lieutenant-Governor of Manitoba, but a technical difficulty being

raised, he returned to his judicial duties. In December, 1889, on the resignation of Sir Andrew Stuart, he was appointed Chief Justice of the Superior Court, and shortly after the honor of knighthood was conferred upon him. While at the Bar he acted as secretary of the commission that revised the statutes of Lower Canada. In early life he became the friend of the late Sir John Macdonald, of whose ability he had the highest opinion.

Sir Francis Johnson married, first, in September, 1840, Mary Gates Jones, daughter of Nathaniel Jones of Montreal; and, secondly in March, 1857, Mary Mills, daughter of John Milliken Mills, of Somersetshire, England. The latter survives him.

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On the 31st ult., the Court of Review having met as usual to render judgments, nearly all the judges of the Court were present, and there was also a large attendance of the bar. Mr. Justice Jetté, the senior justice, addressed the bar as follows:—

“C'est la première fois que cette cour se réunit depuis la mort de notre regretté juge en chef et je ne saurais laisser passer cette occasion sans me faire l'interprète de mes collègues du Banc et de vous tous, pour exprimer publiquement la douleur que nous éprouvons en présence de cette tombe qui vient de se fermer.

“C'est le grand honneur de notre profession, dans tous les pays du monde, de savoir s'élever au-dessus des étroits sentiments de rivalité, et de reconnaître volontiers, même avant que la mort soit devenue le mérite de ceux qui nous ont précédés.

“Le magistrat distingué que le pays vient de perdre avait, depuis longtemps, su conquérir le premier rang parmi nous. Intelligence d'élite, esprit large, sans préjugés, et d'une culture exceptionnelle, il relevait à la hauteur de sa pensée toutes les questions dont il avait à s'occuper.

Qui n'a admiré, à chaque fin du mois, dans cette enceinte, cette noblesse de langage, ce bonheur d'expressions, qui donnaient tant d'attrait à ses résumés des causes qu'il avait à juger? Qui n'a remarqué cette facilité avec laquelle il s'exprimait, soit en français, soit en anglais, possédant cet avantage important dans sa position de parler bien les deux langues.

Respectueux des nobles traditions qui ont fait la force et la gloire de la magistrature et du barreau chez les deux grandes nations qui ont peuplé cette province, nul plus que lui n'avait le sentiment de la dignité professionnelle. Et ce sentiment, il l'exprimait en toutes occasions.

“Il serait difficile en ce temps de décadence, au moment où disparaît de plus en plus cette grande force du respect de soi-même et des autres, il serait difficile, dis-je, de s'exagérer l'importance de ces précieux exemples. Souhaitons, messieurs, que ces traditions soient toujours vivaces et tâchons de les conserver avec le souvenir de ceux qui savent ainsi nous les rappeler.

"Quant à nous qui avons été associés pendant des années aux travaux de cet éminent magistrat, nous aurons un motif de plus de respecter et de chérir sa mémoire; nous n'oublierons jamais l'exquise délicatesse avec laquelle il savait nous cacher son autorité et s'acquitter des devoirs de sa haute fonction en laissant cependant à chacun de nous la plus large part d'initiation et de sa responsabilité personnelle. Ce rare talent de faire ainsi accepter son contrôle et son autorité n'est donné qu'aux esprits vraiment supérieurs, et notre regretté juge en chef l'avait au plus haut degré."

Mr. John Dunlop, Q. C., *bâtonnier*, made an appropriate reply on behalf of the bar.

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### GENERAL NOTES.

**BANQUET TO MR. JUSTICE DAVIDSON.**—On May 8, Mr. Justice Davidson visiting his native county, Huntingdon, on judicial business for the first time since his elevation to the bench, was tendered a complimentary banquet by the principal citizens.

**SIR L. E. N. CASAULT.**—Mr. Justice Casault, of the Superior Court, and who for some years has filled the position of acting Chief Justice at Quebec, has received the honour of knighthood. Mr. Justice Casault was born in 1823, educated at the Seminary of Quebec, admitted to the bar in 1847, appointed Queen's Counsel in 1867, and elevated to the bench in May, 1870. By the death of Chief Justice Johnson, Judge Casault becomes the senior justice of the Court.

**COURT OF CRIMINAL APPEAL.**—It has been announced in the English House of Commons that the Government has no present intention of introducing legislation on the subject of a Court of Criminal Appeal.

**ATHLETES AT THE BAR.**—The compatibility of athletics and work of a more serious kind is often illustrated by the successful career of athletes at the Bar and on the Bench. But we believe that prior to last week the spectacle was never witnessed of a Solicitor-General competing in an important tennis handicap. We regret to find, that Mr. R. T. Reid was not successful, though we read that he showed much skill, and wanted but a trifle more fortune to have scored several contested points. — *Law Journal, (London.)*

# THE LEGAL NEWS.

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VOL. XVII.

JUNE 15th, 1894.

No. 12.

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## CURRENT TOPICS AND CASES.

In *Cobb v. The Great Western Railway Co.*, a case which went to the House of Lords and was decided by that tribunal on the 4th of June, 1894, an attempt was made to hold a railway company liable for money stolen from the person of a passenger. The grounds alleged in support of the action were two in number: first, negligence of the company in not detaining the train to enable the plaintiff (appellant) to have the suspected persons arrested and searched; secondly, negligence in permitting overcrowding, sixteen persons being crowded into a compartment constructed to carry ten passengers. The House of Lords (Earl of Selborne, Lords Watson, Macnaghten, Morris, and Shand), affirming the decision of the Court of Appeal (62 Law J. Rep., Q. B. 335), held that the starting of the train was not opposing an obstacle to the recovery of the plaintiff's property of such a kind as to make the company liable to damages; and as to the overcrowding, no connection had been shown between it and the loss.

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In *Harper v. Marcks*, the Queen's Bench Division in England (May 23) decided a point somewhat similar to that which came up recently in the lizard or chameleon

case in Montreal (*ante*, p. 66). The court held that a lion kept in a cage at the Aquarium was not a domestic animal. *Apropos* of the chameleon case Mr. Irving Browne writes in the *Green Bag*:—"The Maine Supreme Court would fall in with this, having decided that the dog is not a domestic animal. *State v. Harriman*, 75 Me. 562; 46 Am. Rep. 423. And the Queen's Bench of England once held the same of parrots, and the same has been held in England of a performing bear. But the contrary has there been held of a linnet used as a decoy, and a Manchester police magistrate once held it cruelty to domestic animals to feed tame rats to an Indian ferret."

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The cable brings intelligence of the death of the Lord Chief Justice of England. Lord Coleridge has been in uncertain health for some time, and even before his lordship was forced to relinquish judicial work he was subject to attacks of drowsiness on the bench, which the bar found at times rather inconvenient. The Chief Justice became famous as a barrister all over the world by his connection with the Tichborne case, in which his speech occupied nearly a month. He was a pleasing and graceful speaker on public occasions and at social gatherings. His article in the *New Review* (see 12 Legal News, p. 297) upon the late Mathew Arnold attracted considerable attention. Lord Coleridge visited the United States about ten years ago as the guest of the New York bar association, and was entertained in the principal cities. (See 6 L.N. 121, 154, 233, 249, 313, 360.) As a judge his reputation was not equal to that of Lord Bowen whose death was recently noticed, but he nevertheless possessed ability of a high order.

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Some of our judges are showing in a practical way their dislike of funeral pomp and display. The funeral of the late Mr. Justice Mackay was conducted privately

at his special request, and the late Chief Justice Johnson was disposed to carry simplicity still further, for he expressed a wish that there be no formality, and that "a plain deal coffin" be used for the interment of his body.

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Mr. R. P. Fitzgerald, Q. C., of Charlottetown, P. E. I., has been appointed Vice-Chancellor and an assistant judge of the Supreme Court of Prince Edward Island, in the place of Joseph Hensley, deceased.

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#### *JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.*

LONDON, April 26, 1894.

*Present* : LORD HOBHOUSE, LORD ASHBOURNE, LORD MACNAGHTEN,  
SIR RICHARD COUCH.

DAME GEORGIANA MUSSEN et al., appellants, & CANADA ATLANTIC  
RAILWAY Co., respondent.

*Expropriation—Just indemnity—Country residence—Interference with  
award of arbitrators.*

*Judgment of Court of Queen's Bench, Montreal, December 23, 1892,  
(R. J. Q., 2 B. R. 222) affirmed.*

SIR RICHARD COUCH :—

The respondents in this appeal, the Canada Atlantic Railway Company, were enabled by certain statutory powers to make a line of railway running through the district of Montreal. Amongst other lands required by them for the purposes of their railway was certain land in the said district, the property of one William Norris. The company made an offer to Norris of the sum of \$1,600 as damages and compensation for the land intended to be taken, and in the event of the offer not being accepted, they named their arbitrator. Norris declined the offer and named his arbitrator. The arbitrators were unable to agree upon a third arbitrator, and the company applied to the Superior Court, according to the provisions of the Railway Act (51 Viet., c. 29), to name one. This the Court did. Hibbard was the

company's arbitrator, Ross was Norris's arbitrator, and Rielle was the arbitrator named by the court. The arbitrators met and took a large body of evidence on both sides. The evidence was of a most contradictory character both as to the value of the land taken and the injury which was caused to the remainder of the property.

It appears that the property had at one time belonged to William Benjamin Simpson, who spent a very considerable sum of money upon it. It was well situated, with a view of the river St. Lawrence. Simpson died in 1883, in embarrassed circumstances, and the property was sold at a sheriff's sale in 1884 for \$5,300. Norris was the nominal purchaser, but he really represented a small syndicate of some of Simpson's creditors, who hoped to re-sell the property at a profit and thus get back part of their losses.

Hibbard and Rielle made their award on the 22nd July, 1889, by which they awarded a sum of \$3,000 to Norris. Ross, Norris's arbitrator, made a separate award in the same month, giving \$9,750. Both sides appealed to the Superior Court, as they were empowered to do by the Railway Act. The appeal was heard by Mr. Justice Taschereau, and it is stated that he went to view the property. He gave judgment on the 8th September, 1890, increasing the amount awarded by the majority of the arbitrators from \$3,000 to \$6,000. The company appealed to the Court of Queen's Bench. The appeal was heard before the Chief Justice and four other Judges, and on the 23rd December, 1892, judgment was given by one of the judges for the Court, reversing the decision of Mr. Justice Taschereau, who had simply awarded the sum of \$6,000, without giving any reasons for his decision. The Court of Queen's Bench, however, went fully into the matter, and laying down what they considered to be the proper test of the value of the property, arrived at the conclusion that the award of the two arbitrators ought to stand.

Their lordships entirely agree in the judgment of the Court of Queen's Bench. They think—looking to the fact that this was the decision originally of a majority of arbitrators, who were said in the judgment of the Court of Queen's Bench to have been "experts," and to have been "men of more than ordinary business experience," and looking further to the fact that the arbitrators had the advantage of seeing and hearing the witnesses who were examined before them—that an appeal from a decision

given in such circumstances, upon a question which was merely one of value, is one which should be discouraged. Their lordships will therefore humbly advise Her Majesty to affirm the judgment of the Court of Queen's Bench, and to dismiss this appeal, and the appellants will pay the costs of it.

*Bosanquet, Q. C.*, and *H. E. Gurner*, for appellants.

*J. Duhamel, Q.C.*, and *Gore* for respondents.

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### QUEEN'S BENCH DIVISION.

LONDON, May 23, 1894.

#### [MAGISTRATE'S CASE.]

HARPER, appellant, v. MARCKS, respondent (29 L. J., 342).

*Cruelty to animals*—'Domestic animals'—*Lion*—*Wild animal in confinement*—12 & 13 Vict., c. 92, ss. 2, 29—17 & 18 Vict., c. 60, s. 3.

Case stated by a metropolitan police magistrate.

An information had been laid against the respondent for alleged cruelty to certain lions. The lions were kept in a large cage at the Aquarium, into which a lady "skirt dancer" was introduced accompanied by the respondent, a lion-tamer, who was armed with a whip and a strong steel-headed pole. According to the appellant a violent use was made of the whip, but cruelty was not to be assumed against the respondent, as his witnesses were not called owing to the dismissal of the case by the magistrate, who held that these lions were not "domestic animals," to which section 2 of 12 & 13 Vict., c. 92, and section 3 of 17 & 18 Vict., c. 60, alone applied. The learned magistrate stated the case on this point alone, and cited the cases of *Bridge v. Parsons*, 32 Law J. Rep. M. C. 95; 3 B. & S. 382; and *Filburn v. The People's Palace Company*, 59 Law J. Rep. M. C. 471; L. R. 25 Q. B. Div. 258.

*Willes, Q.C.*, and *Colam* appeared for the appellant. They relied on *Colam v. Pagett*, 53 Law J. Rep. M. C. 64; L. R. 12 Q. B. Div. 66; *Swan v. Sanders*, 50 Law J. Rep. M. C. 617; and *Aplin v. Poritt*, 62 Law J. Rep. M. C. 144.

*Poland, Q. C.*, and *Bonsey*, for the magistrate, were not called upon.

The COURT (CAVE, J., and WRIGHT, J.) dismissed the appeal, on the ground that these lions were wild animals merely kept in confinement, and, as such, could not be deemed domestic animals, and (*per* Wright, J.) that such animals could only be regarded as domestic which were of a kind ordinarily domesticated, and which, in fact, were themselves domesticated.

Appeal dismissed.

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### THE BANKRUPTCY LAW IN ENGLAND.

The Incorporated Law Society in England have issued a pamphlet, in which many reasons are stated against the present bankruptcy and liquidation system. These reasons are interesting at a time when a new bankruptcy law is before the Parliament of Canada. The principal points are summarized as follows :—

1. After a trial of the Bankruptcy Act for ten years the public show a decided preference for private trustees selected and controlled by the creditors themselves.

2. A very large proportion of insolvent estates is withheld or withdrawn from official administration.

3 Official administration was condemned by Parliament in 1869, after an experience of upwards of thirty years, and after an exhaustive inquiry under the commission appointed in 1864.

4. The interregnum of official administration, with delays, routine, and hesitation, and frequently forced realizations of assets between the date of the receiving order and the appointment of a trustee, is often productive of serious loss to creditors, and in some circumstances—such, for instance, as the stoppage of a private country bank or an extensive foreign mercantile business—may have disastrous effects.

5. Public disclosure of fraud and dishonesty might be secured even more effectually without introducing officialism into the management and administration of the property.

6. Government interference in the management and administration of private affairs—*i.e.* not of general public concern—is undesirable, and the conduct of such business is better left to the control of the persons directly interested.

7. Government monopolies carrying on administrative business are against public policy.

8. Official departments undertaking private business, and not self-supporting, become a burden to the public exchequer with no corresponding public benefit.

9. There is no public demand for increased officialism, and proposed extensions emanate from the official departments. Public opinion is adverse to official interference, and the public prefer to manage their own affairs in their own way.

10. The increase of patronage in the appointment to numerous highly-paid offices is to be deprecated.

11. Periodical reports of official departments naturally tend to present statistics in a light favourable to a continuance of officialism.

12. An official system which is not required and not self-supporting is a source of danger, as likely to press for extensions of its operations, either compulsorily or otherwise.

13. Official departments carrying on administrative business must in all heavy and difficult cases call in extraneous assistance, which practically means that the work is twice paid for—viz., once to the individual who does the work, and over again in the heavy fees of the official department.

14. Such extraneous aid is moreover often called in on speculative terms as to remuneration, because the Treasury or the Board of Trade does not permit the department to incur expense beyond the fund being administered; and this, where there may be no sufficient estate, results in unsatisfactory selection and exercise of official patronage.

15. Official administrative systems tend to become less efficient and more encumbered with routine, having no personal inducements to maintain a high standard of efficiency.

16. Unsatisfactory administrative official systems, when once established, cannot be displaced without compensation or injustice.

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### DEMERS v. HARVEY.

M. le Rédacteur,

En jugeant la cause de *Demers v. Harvey*, page 2, vol. 5, des Rapports Judiciaires, M. le juge Routhier dit :— “ M. Girouard, “ dans son ouvrage, “ *On Bills and Notes*,” page 123, no. 38, dit “ que la décision de *Beaulieu v. Demers*, a été renversée par la

" cour d'appel dans la cause de *La Banque Nationale & Ross et al.*,  
 " 11 Q. L. R. 109. Mais rien n'est moins exact. C'est, même le  
 " contraire qui est la vérité; car dans cette cause, l'exception di-  
 " latoire pour appeler garants sur billets promissoires avait été  
 " maintenue en appel.

" M. Girouard cite aussi Bédarride, Pardessus et Dalloz; mais  
 " je n'ai rien trouvé dans ces auteurs aux endroits cités sur la  
 " question débattue.

" D'autre part, M. Girouard reconnaît que d'après la jurispru-  
 " dence canadienne, (a well settled jurisprudence), l'appel en ga-  
 " rantie est accordé dans des cas analogues à celui qui m'est sou-  
 " mis."

Voici ce que je dis à l'endroit cité par le savant juge:—

" In Quebec, the dishonour of a bill not only gives the holder a right of action against all parties, but the endorser and all parties who stand as sureties or quasi sureties, may, even before paying, proceed against the principal debtor to be indemnified. This action is generally called an action *en garantie*, and is expressly given by article 1953 of the Quebec Civil Code. It is recognized by what may be considered a well settled jurisprudence. *Desbarats v. Hamilton*, 2 L. N., 279; *Macdonald v. Whitfield*, P. C., 8 App. Cases, 733; *Mackinnon v. Keroack*, 15 Can. Sup. Ct. 111. But the exercise of this right of action *en garantie* must cause no delay to the holder in his own recourse. *Durocher v. Lapalme*, M. L. R., 1 S. C. 494; *Block v. Lawrence*, M. L. R., 2 S. C. 279; *Banque Nationale v. Ross*, 11 Q. L. R. 109, *overruling Beaulieu v. Demers*, 5 R. L. 244. Such is also the law of France, *Rej. 24 Floréal*, an. 13, D. 5, 1, 371; 2 *Pard.* 333; *Bédarride*, 299; *Dalloz*, *Table de dix ans*, vo. *Lettre de Change*, no. 140 and following; *Code de Commerce*, arts. 118, 165 and 167."

Vous observerez que je ne dis pas que la cause de *Beaulieu & Demers* a été renversée par la cour d'appel. Tout ce qu'il y a d'inexact dans le passage de mon livre c'est le mot "overruling" que je viens de souligner, qui aurait dû être placé avant "*Banque Nationale v. Ross*," pour indiquer que les deux dernières décisions étaient opposées aux deux premières, plus anciennes. Cette erreur est d'autant plus manifeste que les deux causes de *La Banque Nationale v. Ross* et *Beaulieu & Demers* ont été jugées dans le même sens.

Quant aux autorités françaises, le savant juge n'a évidemment pas les éditions que je possède et que j'indique en tête de mon ouvrage. Bédarride, 2<sup>e</sup> édit., 1877, vol. 1er, p. 299, parlant du recours en garantie de l'accepteur qui accepte sans provision, dit : "La Cour de Cassation décidait le 1er décembre 1832, que l'accepteur ne pouvait même exiger un délai pour appeler le tireur en garantie."

Pardessus, éd. 1841, Droit Commercial, vol. 2, p. 333 : "Il n'est pas même nécessaire que celui qui veut exercer cette garantie, ait payé ; dès qu'il se trouve assigné par le porteur, il a droit d'appeler ceux qui lui doivent garantie devant le tribunal où il est traduit, *sans toutefois que cette mise en cause apporte aucun retard dans l'exercice des droits du porteur.*"

Je réfère à Dalloz afin que le lecteur puisse facilement connaître la jurisprudence française au sujet de l' "action du porteur contre les endosseurs et de ces derniers contre les endosseurs antérieurs, l'accepteur et le porteur."

Montréal, 15 juin 1894.

D. GIROUARD, C. R.

#### RETRAIT SUCCESSORAL—PHILLIPS v. BAXTER.

The Supreme Court of Canada has unanimously confirmed the judgment of the Court of Review in *Phillips v. Baxter* (R. J. Q., 4 C. S. 151). The opinion of the Supreme Court was pronounced by Mr. Justice Taschereau as follows :

TASCHEREAU, J. Appeal by defendant directly from a judgment of the Court of Review.

Action (by respondent) *en retrait successoral* for two shares, of one fifth each, of the undivided succession of the late W. E. Phillips, sold by two of her brothers, co-heirs, Charles and Henry, to the appellant (defendant). Of all the numerous questions and points of law that may arise out of any action of this kind, the present suit presents but few ; and, as we are unanimously of the opinion that the appellant has no reason to complain of the judgment ordering the *retrait* asked for by respondent, and as we adopt in their entirety, the views of the learned judges who have expressed opinions on the case, as well in the Court of Review as in the Superior Court, I will essay to tell, as succinctly as possible,

the result of our deliberations and the reasons upon which, more particularly, the same has been based. Brief as my remarks will be (although longer than I anticipated at first), the number of authorities we have had to consult before arriving at a definite solution of the various points submitted by the parties at the hearing has been considerable; the novelty, in our jurisprudence, of the questions raised, the importance of the interests at stake, the ability with which the case has been argued upon both sides, required it. At the same time the arduous work of the counsel on both sides and their profound researches have, I am happy to state, much facilitated our task.

Article 710 of the Civil Code of Quebec, a textual reproduction of Art. 841, of the Code Napoléon, has continued as law in the Province what is commonly called *retrait successoral* which (with exclusive limitations to the family and co-heirs) is no more than what was called in the old French law *retrait de bienstancé*. This *retrait*, in effect, consisted of the faculty given by the law in a general manner, to all those possessing *par indivis*, to take back, *retrayer*, the part sold by a joint proprietor upon reimbursing the purchaser the price given. Loisel, Inst. Cout., Vol. 2 p. 45. The principal reason (*motif*) of this legislation is to be found in our days, as well in France as in the Province of Quebec, in the desire to protect families from the intrusion of strangers seeking indiscreetly to meddle in their family private affairs, and to guarantee them against the litigious cupidity of purchasers of hereditary rights. An amicable division (*partage*), besides, is generally possible, even probable, between relatives; while, when a stranger has a right to participate therein, almost always it becomes necessary to proceed *en justice* and suffer the consequences of an intermeddling which is vexatious, disagreeable, and may ultimately be ruinous to all the family—Hué, No. 319. And in a case where there are only two co-heirs, in the event of a sale by one of them, the *retrait successoral* obviates the necessity of a partition, an operation always bristling with difficulties.

It is established, both by doctrine and jurisprudence, and has not been denied by appellant, that the *retrait* can be exercised as well by direct action as by exception, and that the action is imprescriptible and admissible as long as the division (*partage*) has not been consummated between the co-heirs. D 83-1-268. It is an annex of the action of partition, and like it is perpetual. 3 Hureaux No. 321. An heir who sees his co-heir selling his share

is not obliged to intervene at the time in order to retain this right of *retrait* ; and the purchaser can himself resell, (and this resale with the knowledge of the co-heirs,) followed by one or more other sales, without such abstention from acting being a ground of forfeiting, either individually or collectively, their right to exercise the *retrait* of the share so sold and by the first sale be put outside the family ranks. All the sub-assignees, like their immediate *auteur*, are presumed and considered as knowing the right or faculty of the co-heirs of their *auteur* and the risks of eviction. It is a blemish on the title of each one of them to the property which the partition alone will wipe off.

"It follows, from what we consider the right of *retrait réel en partie*, (says Dunod, treatise on *retraits*), that the co-heir has the right, when the *heritage* has been alienated by the purchaser within the year of the *retrait*, to exercise it against the purchaser or against the actual holder, at his option. This has been decided by our *Coutume*, even when the property may have passed through several hands and the actual possessor holds it under an onerous title." What the author here limits to one year for the *retrait lignager* applies to *retrait successoral* until a partition has taken place.

I will, in a moment, cite other authorities in the same sense. That the respondent had a right of action in the present instance does not admit of doubt, and has not, in fact, been questioned. It is not contested that the appellant was *non successible* and that respondent's two brothers, Charles and Henry, who sold him their undivided shares in the succession of their father in which the respondent wishes to be subrogated, were co-heirs (*successibles*). That the sale by Charles (or his curator) to the appellant was an onerous contract and a cession of all his rights also in the succession (*droits à la succession*) is incontestable. That the sale by Henry to the appellant was likewise a sale of all or an aliquot portion of his rights in the said succession which can give rise to *retrait* is a point that has been contested by appellant, but after examining the evidence and the documents produced, (for it is a question of fact rather than of law), we do not think there can be the slightest doubt as to the correctness of the conclusion, on this point, arrived at by the Court *a quo* adversely to the appellant. I will confine myself to referring on that point to the authorities cited in Sirey, Code Annoté, under Art. 891, No. 41, Fuzier Herm., Code Annoté, under Art. 841, Nos. 21,

42, 57, 235 ; to Vol. 13, *Revue de legis. and de juris.*, p. 532, art. par Derome where I find a learned dissertation on the subject ; to *Durocher v. Turgeon* (19 L. C. J. 178), and to *Leclerc v. Beaudry* (10 L. C. J. 20) and Dutruc No. 487.

Another objection to respondent's action in its entirety taken by appellant, appears to us entirely unfounded. It is that by which, invoking the doctrine adopted by the Court of Appeals at Montreal in *re Demers v. Lynch* (1 Dor. Q.B.R. 341) that a vendor, with right of redemption, cannot exercise the redemption before having tendered the price agreed upon, he argues from that here the respondent not having made a legal tender before action brought, should have her suit dismissed. The appellant makes here evidently a false application of this doctrine. There is no redemption sought by respondent's action ; it is simply a subrogation, in the place and stead of the appellant as assignee of the two shares in question, the respondent seeks. As Hureaux (3 Vol. des Suc., No. 307) expresses in very happy terms, all the plaintiff says to the defendant in such an action, is "Get out of that so that I can take your place." Now doctrine and jurisprudence are unanimous in saying that she was not obliged to make any previous legal tender ; it was sufficient for her to undertake, by her conclusions to indemnify the defendant before the execution of the *retrait* as she has done.

This disposes of defendant's objections to the action in its entirety.

I now come to points that apply to only one or the other of the two shares in question.

First of all, as to that of Charles, the only objection made by defendant to the *retrait* demanded is based upon the fact that he acquired it from the curator (to whom, it appears, Charles, as *trader*, had made an assignment under Art. 763 et seq. of the Code of Procedure) upon the authorization of a judge as required by art. 772. Such a sale says he, is equivalent to a sale *par decret*, and is not subject to *retrait*. This pretention was rejected by both the Superior Court and the Court of Review, and justly so. We have not here to decide whether *retrait* would lie against a sale made upon an ordinary adjudication *en justice* after publications (*annonces*) and bidding, and tacit refusal by the co-heir to become purchaser. That may be somewhat a doubtful question, although it seems to me that in France, the jurisprudence and the great majority of authors, admit the right of *retrait* even after

such a sale. It was the same with respect to *Retrait Feodale*, Porquet de Liv., des Fiefs, p. 247. It is true that Dalloz, Repert. vbo. Suc. No. 1917, as also an arrêt of La Cour de Paris, S. 36. 2. 113 ; Hureau des Suc. 3, No. 319, and Demolombe 4 des Suc. No. 110, are of a contrary opinion. But an arrêt of the Cour de Lyons S. 44, 1, 614, Dutruc, Partage de Suc. No. 496 ; Laurent Vol. 10, No. 370 ; F. Herm. Code Ann. under art. 841 No. 71, admit *retrait* even against an adjudication *en justice*. Art. 150 of the Coutume de Paris expressly decrees it for *retrait lignager* ; and although this art. of the Coutume has been abrogated by Stat. 1855, Ch. 53, S. R. B. C., which put an end to *retrait lignager* in the Province of Quebec, we are justified, as has always been the case in France, as well under the old as under the modern jurisprudence, to have recourse to the principles which governed this kind of *retrait*, when, as in the matter of the time required for the existence of the right, for instance, or the formalities to be followed to obtain it, there is not complete divergence between the two. Pothier *des retraits* No. 76 ; Bourj Dr. Com. Vol. 1, p. 1021, Bretonnier sur Henrys Vol. 4, p. 587, No. 12, and Duplessis Vol. 1, p. 328 all admit the *retrait* after a sale *en justice*. " Quoique le decret soit public, says the latter, qu'il purge toutes les charges, et que les lignagers aient la liberté d'y encherir néanmoins le *retrait* lignager y a lieu . . . quoique le retrayant ait été présent à l'adjudication." On the same principle the Seigneur, even after filing an opposition to the decret for the conservation of his rights, was not excluded from the *retrait* feodale. Pocquet de Liv., des Fiefs, p. 429.

But, as I have said, in this instance we have not to pronounce on this question. Here there was no sale *en justice* at which the plaintiff (respondent) could have become adjudicataire. The appellant acquired from the curator, Charles' rights, neither more nor less, with all the incumbrances, (charges) mortgages and conditions with which they were burdened and to which they were subject. Now one of these charges or conditions was that the sale of these undivided hereditary rights was subject to *retrait successoral*, in favor of all or any one of Charles' co-heirs, and this condition which the law attaches to every sale of hereditary rights, can in such case no more be ignored by the purchasers of such rights than if it had been stipulated in the deed of acquisition, or, at least, such ignorance cannot excuse them. In the eye of the law the defendant is in the same position as if he had purchased from Charles directly.

We decide, therefore, that this objection of the defendant relative to the share acquired by him from Charles' curator is ill founded. I pass now to Henry's share; I have already said that we entirely concur with the Court *a quo* in the conclusion arrived at by it on the question of fact and law, that the sale to the defendant was one giving rise to the *retrait*. There only remains to be examined a single objection on defendant's part to the plaintiff's demand of *retrait* of this share. He has pleaded and proved that, before action brought by deed duly enregistered, he sold to Mad. Beique, Henry's share in a certain immovable, situated in Cote St. Antoine, near Montreal; and from this fact he asks us to conclude, as he had in the Court of Review, that *quoad* that part at least, plaintiff could not in the present suit, in the absence of Mad. Beique, obtain judgment of *retrait*. But this objection, which at first sight may seem serious, cannot prevail against the plaintiff's demand. Here the defendant invokes only the rights of Mad. Beique. Now by what right does he defend Mad. Beique? Does he not therein plead the rights of others? Is he not merely invoking *jus tertii*? Useless to tell us, as he has done, that anything that may be decided in this suit will remain *quoad* Mad. Beique *res inter alios acta* and can in no way illegally prejudice her rights. That is another argument against his objection, and nothing else. If the law ordains that the judgment granting *retrait* reacts against her as holder of a portion of his rights, she must submit to it, but this tribunal will not say to her such is the law until she shall have had occasion to defend herself. Doubtless, it perhaps might have been better for the plaintiff to have impleaded Mad. Beique, if not at the institution of the action, at least, as soon as such sale was pleaded by defendant. There are authors who seem to say that, in such a case it is for the defendant to denounce the suit to the possessor (*détenteur*). Pothier des retraits Nos. 189, 190, is of opinion that it is more equitable that the détenteur should be called in by one or the other of the parties to the suit. And the parties certainly would have had no reason to complain, it seems to me, if, under the circumstances the Superior Court had, *ex proprio motu*, ordered it at any stage of the case. But since neither the Superior Court nor the Court of Review have thought proper so to do, should we now do it? The defendant, if I have correctly understood him, saw there a reason for asking us, if not for the dismissal of the entire action, at least for an express declaration

and adjudication, withdrawing the part held by Mad. Beique from the effect and operation thereof. But the law rejects such a prayer. He has no *griefs*. I will cite extracts from some authors to show what considerations more particularly guided us on this part of the suit. But, before doing so, I would point out that it is evident that the plaintiff had necessarily to demand the *retrait* of both the shares acquired by the defendant, as well Charles' as Henry's ; to have demanded only one would have been an absurdity. The essential aim of *retrait successoral*, as I have already said, is to exclude the purchaser from the partition "*banquet dont chacun des convives a le droit de chasser les intrus qui pourraient troubler la fête.*" Hean Rev. Prat. Vol. 18, p. 329. Now it is evident that this object would be far from being attained, if the plaintiff had not directed her action against both the shares of Charles and Henry. Demol. 4 de Suc. 119. Hureaux Dr. Suc. 3 Vol. No. 332. S. 40. 2. 318.

According to the principles of law, the *retrayant* takes the place of the retrayé, in *omnibus et per omnia*, and the plaintiff had the right to her complete subrogation in the place and stead of the defendant as to these two shares.

The *retrait* has a retroactive effect as if, on the day itself of the acquisitions by defendant, she herself had bought the shares of her co-heirs, "*qui retrahit perinde est ac si emisset ab ipso venditore et primus emptor perinde habetur ac si non emisset.*" And consequently all sales, alienations, incumbrances and mortgages made or created by defendant of or upon such shares, or any portion thereof, disappear. Pothier des *retraits* No. 341, 1, Bourjon 1070-1075 ; 3 Hureaux No. 337 et seq. 146, Aubry and Rau, Vol. 6, par. 621 ; Laurent Vol. 10, No. 386, and the note of the reporter. Royneau 92. l. 113, Hué. Code Civ. Vol. 5, No. 329 ; Bretonnier sur Henrys Vol. 4, p. 586 et seq.

The acquisitions of those shares by the defendant are resolved and put an end to *ab initio* and reduced *ad non actum, ad non causam*. Prevost de Jannes Ins. ti vol. 2, p. 246 ; or rather there is no resolution, no annulation of these acquisitions, no more than there is a retrocession, but simply and purely a subrogation, Fuz. Herm. Code Annot. sous art. 841, Nos. 287, 290 et seq., 298. Cass. June 17, 1892, S. 93, 1, 17—the simple substitution of plaintiff to defendant (*neque enim non contractus, sed legalis translatio de persona in personam.*) D'Argentre, Cout. de Bretagne ;

and the retraits can be exercised even after the death of the co-heir vendor. D. 79. 2. 201. By the retraits the original purchaser is excluded as if he were a perfect stranger to the operation. It is a necessity he suffers and to which *volens volens* he must submit. It is as if he had never acquired, says Dunod des retraits p 6. He has no grounds of complaint. He is not taken by surprise ; for, in buying hereditary rights the law itself has inserted in his deed of purchase an unequivocal reserve of his right in favor of the co-heirs of the vendor collectively and individually. And, as soon as this right is exercised, he is held and considered never to have any rights in the thing sold and consequently could not confer any on other persons. Dal. Rep. Vbo. Suc. No. 1891-2001. 1 Berthetol des evic. His possession was burdened with a vice of hereditary organism and any title he may have given to a third person suffers inevitably from the infirmity of his own.

(Concluded in next issue.)

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#### GENERAL NOTES.

THE COLONIES AND THE ESTATE DUTY.—A meeting of the colonial representatives in London was held at the offices of the High Commissioner for Canada, to discuss the propriety of addressing a remonstrance to the Chancellor of the Exchequer relative to the application of the proposed estate duty to the personal property of persons domiciled in the United Kingdom, while the property may be situated in the colonies. There were present the High Commissioner for Canada, and representatives of New South Wales, Victoria, South Australia, Western Australia, Queensland, Tasmania, New Zealand, the Cape Colony, and Natal. Sir Charles Tupper, who presided, characterised the proposal of the Chancellor of the Exchequer as highly inexpedient, and as the initiation of a policy which might produce consequences as grave as they apparently were unexpected. The discussion which followed revealed the absolute unanimity of the colonial representatives so far as the inadvisability of the Government's proposal was concerned, but, as several of the Australasian Agents-General had not received instructions from their Governments, it was considered desirable to delay coming to a final decision until the colonial authorities could be communicated with.

# THE LEGAL NEWS.

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VOL. XVII

JULY 2nd, 1894.

No. 13

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## SUPREME COURT OF CANADA.

Quebec.]

### McINTOSH v. THE QUEEN.

*Criminal appeal—Criminal Code, 1892, sec. 742—Undivided property of co-heirs—Fraudulent misappropriation—Unlawfully receiving—R. S. C. ch. 164, secs. 85, 83, 65.*

Where on a criminal trial, a motion for a reserved case made on two grounds is refused, and on appeal to the Court of Queen's Bench (Appeal side) that Court is unanimous in affirming the decision of the trial judge as to one of such grounds, but not as to the other, an appeal to the Supreme Court can only be based on the one as to which there was a dissent.

A conviction under sec. 85 of the Larceny Act, R. S. C., ch. 164, for unlawfully obtaining property, is good, though the prisoner, according to the evidence, might have been convicted of a criminal breach of trust under sec. 65.

A fraudulent appropriation by the principal and a fraudulent receiving by the accessory may take place at the same time and by the same act.

Two bills of indictment were presented against A. and B. under sections 85 and 83 of the Larceny Act.

By the first count each was charged with having unlawfully and with intent to defraud, taken and appropriated to his own use \$7,000 belonging to the heirs of C. so as to deprive them of their beneficiary interest in the same.

The second count charged B. (the appellant) with having unlawfully received the \$7,000, the property of the heirs, which

had before then been unlawfully obtained and taken and appropriated by said A, the taking and receiving being a misdemeanour under sec. 85, ch. 164 R. S. C. at the time when he so received the money. A. who was the executor of C's estate and was the custodian of the money, pleaded guilty to the charge on the first count. B. pleaded not guilty, was acquitted of the charge on the first count, but was found guilty of unlawfully receiving.

On the question submitted, in a reserved case, whether B. could be found guilty of unlawfully receiving money from A. who was custodian of the money as executor, the Court of Queen's Bench for Lower Canada (on appeal), Sir A. Lacoste, C. J., dissenting, held the conviction good.

At the trial it was proved that A. and B. agreed to appropriate the money, and that when A. drew the money he purchased his railway ticket for the United States, made a parcel of it, took it to B's store, handed it to him, saying: "Here is the boodle; take good care of it." On the same evening, he absconded to New York.

*Held*, affirming the judgment of the Court below, that whether A. be a bailee or trustee, and whether the unlawful appropriation by A. took place by the handing over of the money to B., or previously, B. was properly convicted under sec. 85, ch. 164, R. S. C., of receiving it, knowing it to have been unlawfully obtained.

Gwynne, J., dissenting.

Appeal dismissed.

*St. Pierre, Q. C.*, for appellant.

*J. F. Quinn, Q. C.*, for respondent.

Quebec.]

#### HUNT V. TAPLIN.

*Appeal by defendant—Amount in controversy—Pecuniary interest—*  
*R. S. C. ch. 135, sec. 29.*

The plaintiff, who had acted as agent for the late M. S., brought an action for \$1470 for a balance of account as *negotiorum gestor* of M. S. against the defendants, executors of M. S. The defendants, in addition to a general denial, pleaded compen-

sation for \$3,416 and interest. The plaintiff replied that this sum was paid by a *dation en paiement* of certain immovables. The defendants answered that the transaction was not a *giving in payment* but a giving of a security. The Court of Queen's Bench held that the defendants had been paid by the *dation en paiement* of the immovables, and that defendants owed a balance of \$1154 to the plaintiff. On application being made to the Registrar of the Supreme Court in Chambers, the security for appeal to the Supreme Court was allowed.

On motion to quash the appeal by the plaintiff for want of jurisdiction, on the ground that the amount in controversy was under \$2000 :

*Held*, that the pecuniary interest of the defendants affected by the judgment appealed from, was more than \$2000 over and above the plaintiff's claim, and therefore the case was appealable under R. S. C. ch. 135, sec. 29. *MacFarlane v. Leclaire* (15 Moo. P. C. 181) followed.

Motion to quash refused with costs.

*Buchan*, for motion.

*Butler, Q. C.*, contra.

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Quebec.]

#### MONTREAL STREET RAILWAY CO. V. THE CITY OF MONTREAL.

##### *Street Railway contract with municipal corporation—Taxes.*

By a by-law of the city of Montreal, a tax of \$2.50 was imposed upon each working horse in the city. By sec. 16 of the appellant's charter it is stipulated that each car employed by the company shall be licensed and numbered, etc., for which the company shall pay "over and above all other taxes, the sum of \$20 for each two-horse car, and \$10 for each one-horse car."

*Held*, affirming the judgment of the court below (R. J. Q., 2 B. R. 391, that the company are liable for the tax of \$2.50 on each and every one of its horses.

Appeal dismissed with costs.

*Branchaud, Q.C.*, and *Geoffrion, Q.C.*, for appellant.

*L. J. Ethier, Q.C.*, for respondent.

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Quebec.]

## CHAMBERLAND V. FORTIER.

*Appeal*—56 Vic., ch. 29, sec. 1—*Action negatoire*—*Rights in future*  
—R. S. C., ch. 135, sec. 29 (b), amended.

In an action *negatoire*, the plaintiff sought to have a servitude, claimed by the defendant, declared non-existent, and claimed \$30 damages.

*Held*, that under 56 Vic., ch. 29, sec. 1, amending R.S.C., ch. 135, sec. 29 (b), the case was appealable, the question in controversy relating to matters where the rights in future might be bound.

*Vineberg v. Hampson* (19 Can. S. C. R. 369), distinguished.

Motion to quash refused.

*Languedoc, Q.C.*, for motion.

*Amyot, Q.C.*, contra.

Quebec.]

## McLACHLAN V. MERCHANTS BANK.

## McLAREN V. MERCHANTS BANK.

*Partnership*—*Dissolution*—*Married woman*—*Benefit conferred on wife during marriage*—*Contestation*—*Priority of claims*.

On the 10th April, 1886, J. S. McL., a retiring partner from the firm of McL. & Bros, composed of the said J. S. McL and W. McL., agreed to leave his capital, for which he was to be paid interest, in a new firm, to be constituted by the said W. McL. and one W. R., an employee of the former firm, and that such capital should rank after the creditors of the old firm had been paid in full. The new firm undertook to carry on business under the same firm name up to 31st December, 1889. J. S. McL. died on the 18th November, 1886. Mrs. A. McL., the wife, separate as to property of, J. S. McL., had an account in the books of both firms. On the 17th April, 1890, an agreement was entered into between the new firm of McL. Bros., and the estate of J. S. McL. and Mrs. McL., by which a large balance was admitted to be due by them to the estate of J. S. McL. and to Mrs. J. S. McL. The new firm was declared insolvent in January, 1891. Claims having been filed respectively by Mrs. J. S. McL. and the executors of the estate of J. S. McL. against the insolv-

ent firm, the Merchants Bank of Canada contested the claims on the following grounds, *inter alia*: 1st, that they had been creditors of the firm and continued to advance to the new firm on the faith of the agreement of April, 1886; 2nd, that Mrs. J. S. McL.'s money formed part of J. S. McL.'s capital; and 3rd, that the dissolution was simulated.

*Held*, reversing the judgment of the Court of Queen's Bench (R. J. Q., 2 B. R. 431), and restoring the judgment of the Superior Court, that the dissolution of the partnership was simulated; and that the moneys which appeared to be owing to Mrs. J. S. McL., after having credited her with her own separate moneys, were in reality moneys deposited by her husband, in order to confer upon her during marriage benefits contrary to law, and that the bank had a sufficient interest to contest these claims, the transaction being in fraud of their rights as creditors. Fournier and King, JJ., dissenting.

Appeal allowed with costs.

*Laflamme, Q.C.*, and *Greenshields, Q.C.*, for appellants.

*Hall, Q.C.*, and *Geoffrion, Q.C.*, for respondents.

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Quebec.]

#### PARÉ V. PARÉ.

*Accounts—Action—Promissory note—Acknowledgment and security by notarial deed—Novation—Arts. 1169 and 1171 C. C.—Onus probandi—Art. 1213 C. C.—Prescription—Arts. 2227, 2260 C. C.*

In an action of account instituted in 1887, the plaintiff claimed, *inter alia*, the sum of \$2,361.10, being the amount due under a deed of obligation and constitution d'hypothèque, executed in 1866, and which on its face was given as security for an antecedent unpaid promissory note dated in 1862. The deed stipulated that the amount was payable on the terms and conditions and the manner mentioned in the said promissory note. The defendant pleaded that the deed did not effect a novation of the debt, and that the amount due by the promissory note was prescribed by more than five years. The note was not produced at the trial.

*Held*, reversing the judgment of the Court of Queen's Bench for Lower Canada (Appeal side), R. J. Q., 2 B. R. 489, that the deed

did not effect a novation. Arts. 1169 and 1171 C. C. At most it operated as an interruption of the prescription and a renunciation to the benefit of the time up to then elapsed, so as to prolong it for five years if the note was then overdue (Art. 2264 C.C.) And as the onus was on the plaintiff to produce the note, and he had not shown that less than five years had elapsed since the maturity of the note, the debt was prescribed by five years. Art. 2260 C. C.

As to the other items of the accounts, the Supreme Court restored the judgment of the Court of Review, whereby the amount found due to plaintiffs was compensated by the balance to the credit of the defendant, which appeared in the plaintiffs' books.

Appeal allowed with costs.

C. A. Geoffrion, Q.C., for appellant.

A. Ouimet, Q.C., for respondent.

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Quebec.]

#### ROYAL ELECTRIC CO. v. CITY OF THREE RIVERS.

*Contract—Electric plant—Reference to experts by court—Adoption of report by two courts—Reference clause in contract to arbitration.*

The Royal Electric company having sued the city of Three Rivers for the contract price of the installation of a complete electric plant, which under the terms of the contract was to be put in operation for at least six weeks before payment of the price could be claimed, the court referred the case to experts on the question whether the contract had been substantially fulfilled, and they found that owing to certain defects the contract had not been satisfactorily completed. The Superior Court adopted the finding of fact of the experts, and dismissed the action. The Court of Queen's Bench for Lower Canada (appeal side) on an appeal, affirmed the judgment of the Superior Court. On appeal to the Supreme Court of Canada,

*Held*, Where there are concurrent findings of two courts on a question of fact, this court will not interfere, unless the findings of fact are conclusively wrong.

2. *Held*, also, when a contract provides that no payment shall be

due until the work has been satisfactorily completed, a claim for extras, made under the contract, will not be exigible prior to the completion of the main contract.

*Quere*: Whether a right of action exists although a contract contains a clause that all matters in dispute between the parties shall be referred to arbitration. See *Quebec Street Railway Co. v. City of Quebec*. (13 Q. L. R. 205).

Appeal dismissed with costs.

*Béique, Q. C., & Geoffrion, Q. C.*, for appellant.

*Geo. Irvine, Q. C.*, for respondent.

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Quebec.]

ROYAL ELECTRIC CO. V. LEONARD & CO.

*Action en garantie—Contract—Sub-contract—Legal connection (Connexité).*

The appellants, who had a contract with the city of Three Rivers to supply and set up a complete electric plant, sublet to the respondents the part of their engagement which related to the steam engine and boilers. The original contract with the city of Three Rivers embraced conditions of which the defendants had no knowledge, and included the supply of other totally different plant from that which they subsequently undertook to supply to the appellants. The appellants, upon completion of the works, having sued the city of Three Rivers for the agreed contract price, the city pleaded that the work was not completed, and set up defects in the steam engine and boilers, and the appellants thereupon brought an action *en garantie simple* against the respondents.

*Held*, affirming the judgments of the Courts below, that there was no legal connection (*connexité*) existing between the contract of the defendant, and that of the plaintiffs with the city of Three Rivers, upon which the principal demand was based, and therefore the action *en garantie simple* was properly dismissed.

Appeal dismissed with costs.

*Béique, Q. C.*, for appellant.

*A. R. Oughtred*, for respondent.

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Quebec.]

**ATLANTIC & NORTH WEST RY CO. v. JUDAH.**

*Railway expropriation—Award—Additional interest—Confirmation of title—Diligence—The Railway Act, secs. 162, 170, 172.*

On a petition to the Superior Court, praying that a railway company be ordered to pay into the hands of the prothonotary of the Superior Court a sum equivalent to six per cent. on the amount of an award previously deposited in court under sec. 170 of the Railway Act, and praying further that the company should be enjoined and ordered to proceed to confirmation of title in order to proceed to the distribution of the money, the company pleaded that the court had no power to grant such an order, and that the delays in proceeding to confirmation of title had been caused by the petitioner who had unsuccessfully appealed to the higher courts for an increased amount.

*Held*, reversing the judgment of the courts below, that by the terms of sec. 172 of the Railway Act, it is only by the judgment of confirmation that the question of additional interest can be adjudicated upon.

*Held*, further, that, assuming the court had jurisdiction, until a final determination of the controversy as to the amount to be distributed, the railway company could not be said to be guilty of negligence is not obtaining a judgment in confirmation of title. The Railway Act, sec. 172. Fournier, J., dissenting.

Appeal allowed with costs.

*H. Abbott, Q. C.*, for appellant.

*Branchaud, Q. C.*, for respondent.

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29 March, 1894.

Ontario.]

**McGEACHIE v. NORTH AMERICAN LIFE ASSURANCE CO.**

*Life insurance—Condition in policy—Note given for premium—Non-payment—Demand of payment after maturity—Waiver.*

A policy of life insurance contained a condition that if any premium, or note, etc., given for a premium, was not paid when due, the policy should be void. M. who was insured by this policy, gave a note for the premium, and when it matured he paid a part and renewed for the balance. The last note was twice renewed, and was overdue and unpaid when M. died. After

the last renewal matured the manager of the company wrote demanding payment. In an action by M's widow to recover the sum insured with interest,

*Held*, affirming the decision of the Court of Appeal for Ontario (20 Ont. App. R. 187) which reversed the judgment of the Divisional Court (22 O.R. 151), that the policy was void under the said condition, and that the demand of payment after the last renewal was not a waiver of the breach of the condition so as to keep it in force.

Appeal dismissed with costs.

*Aylesworth, Q.C.*, for the appellant.

*Kerr, Q.C.*, for the respondents.

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#### RETRAIT SUCCESSORAL — PHILLIPS v. BAXTER.

[Concluded from 192.]

Such are the principles that govern the matter and which we acknowledge and maintain in the litigation between plaintiff and defendant. If, by *ricochet*, to make use of an expression of Demolombe, our decision reacts upon Mrs. Beique, it is a legal sequence we cannot prevent.

Besides we hope that these remarks may, perhaps, have the effect of putting an end to all litigation in this succession, although our decision cannot be *res judicata* as regards Mad. Beique. This is one of the reasons which prevented us from remitting the record to the Superior Court to have her (Mad. Beique) impleaded (*mise en cause*), which, at first, we thought of doing. We considered that by so doing, far from attaining the desired result, we might perhaps prolong the litigation. Besides, it would have virtually deprived the plaintiff of a judgment against the defendant to which she has an undeniable right. If, hereafter, from the omission of Mad. Beique from the record, the plaintiff suffers any damages, be it merely prolonged delays or the inconvenience of a new suit, she will only have herself to blame.

The defendant has advanced the proposition that, inasmuch as he had sold to Mad. Beique only a determinate portion of an immovable of the succession, the *retrait* does not lie for that part, and he asked us, for this reason, to reform the judgment of the Court of Review whereby the exemption from *retrait* of such part was refused. But this proposition is entirely erroneous and the demand upon which it is based cannot be granted. According

to him it would suffice for him to have sold all parts by him acquired, say to five different persons, each for a determinate part, to deprive the plaintiff of her right to *retrayer* the whole.

Such is not the law. The right of *retrait* would be altogether illusory if such were not the case, and if the co-heirs could be so easily thwarted. Only, in such cases, it is necessary to see against whom the action should be directed. In matters of *retrait lignager*, when only one immovable was in question, according to certain authors, the first purchaser should be ignored and the action directed against the holder, subassignee, alone. But in cases of *retrait successoral* when, as in the present instance, the original purchaser has resold merely a determinate portion of an asset of the succession, and the balance of the hereditary rights still remains in his hands, the plaintiff must of necessity direct her action against him, with the faculty or privilege, if she deems proper, of calling in the holder of the part so resold. Now, in such a case, that is to say, if between the time of the purchase and the *retrait*, the purchaser has resold, which by law he has a perfect right to do, if there be a difference between the prices of the first purchase and the resale, which price has the *retrayant* to reimburse?

It will be, as the judgment *a quo* declares, the price of the first purchase, the sale made by the co-heir of the *retrayant*. L'Abbé, Vol. 6, Rev. de *Legis. & Juris.*, 142. There are authorities to the contrary, among others, Dutruc, No. 515; Laurent, Vol. 10, No. 382, and an *arrêt* in 1857 of the Court of Besançon, *re* Dautriche, S. 58-2-292; D. 58-2-111. But the opposite opinion has prevailed and, agreeing with the judgment *a quo*, we adopt it. Pothier, *Retraits* No. 341; Merlin *Quest. v. dr. suc.* par. 2, No. 2. Aubry & Rau, Vol. 6, p. 529; Demolombe, 4 des *Suc.* No. 110; Benoit *dr. suc.* No. 135. 3 Hureaux No. 330. "The action for *retrait* (says Le Caron on the *Coutume de Peronne*, p. 351), should be instituted against the holder and possessor; at the same time, the price of the first purchase only should be paid." And Loysel (in his *Institutes Coutumières*, Vol. 3, p. 63), whose learned commentators Dupin and Laboulaye (Ed. of 1846), in speaking of his works say, "ce n'est pas de la théorie, de la divination, de la conjecture, it is the law itself, such as our forefathers recognized and practised," Loysel, I say, expressed himself in very clear terms as follows: "The *retrayant* is only obliged to pay the price, costs and *loyaux coûts* of the first sale, though the thing may have been

through many other hands during the year and day of the *retrait*." And, add the commentators, "if it were otherwise, the purchaser, by reselling to another, could impair the condition of the retrayant, which would be an injustice." And Dunod des Re-traits, p. 6. "But if the second alienation be by onerous title, which price should be reimbursed by the retrayant? It seems that it should be that of the first, because it alone has given rise to the *retrait*."

The question, as to whether one share in an undivided succession can be seized and sold *en justice*, has been discussed at the hearing. The plaintiff contended for the negative, and based her pretensions upon the doctrine adopted in France by Art. 2205 of the Code Nap. Thomine de Mazure C. P. No. 743; Sirey, Code Annot. sous Art. 2205. The defendant replied that this article has not been reproduced in the Quebec Codes, and that such seizure and sale were perfectly legal in that Province. There is, doubtless, an apparent contradiction between the principle of hereditary law and the seizure of an undivided share in a succession; but I do not see in this suit the propriety of such a discussion. Here, there has been a duly authorized sale of Charles' hereditary rights by the curator. The defendant became purchaser. I see nothing illegal in that. If any nullity there be in it, it is at most only a relative nullity of which the defendant certainly could not take advantage. He could not be allowed to invoke the nullity of his own title in order to defeat the plaintiff's suit. And as to the plaintiff, far from asking the cancellation of this sale, she asks to be subrogated therein. The defendant at the hearing as well as in his factum has said that if a sale by a curator, like that in question, is to be subjected to the *retrait successoral*, the creditors will suffer, for it is evident that it is a rare thing to get purchasers disposed to run such a risk. But there is, it seems to me, a conclusive answer to that objection, which is that the creditors, instead of doing what was done in the case of Charles Phillips, can themselves provoke a partition and then sell that portion falling into their debtor's lot. All authorities are unanimous in recognizing their right so to do. Moreover a purchaser in good faith of an undivided share of hereditary rights is assured that when a *retrayant* presents himself he will obtain subrogation upon having previously perfectly indemnified him.

Two other questions of secondary importance have been raised

by the parties. The first is by defendant who contended, in a feeble manner, it seemed to me, that the plaintiff had lost her right to the *retrait* by having tacitly renounced, or having refused to accept from defendant, Henry's share when offered by him. This is a question of fact, and without hesitation we say, in accord with the Court *a quo*, there is not in the record sufficient proof to sustain this objection.

The second comes from the plaintiff; she complains of the judgment *a quo* upon an intervention, filed in the case by Henry Phillips, her co-heir and vendor, because while dismissing this intervention the Court below did not grant the costs thereof against the defendant. It suffices for me to say that we have time and again decided that we will never interfere with a decision as to the costs in a lower court unless under very special circumstances, which are not to be found in this suit.

I now will add, to the authorities already cited, those of general application which I have met with in studying the case. They are principally taken, it will be seen, from the authors on the *droit lignager*. The expression *droit successoral* is ignored in ancient French law, even in Bourjon where a passage, which I cite, nevertheless decrees it in unequivocal terms. But the rules of *retrait* are in general the same. And, as says L'Abbé (*loc. cit.*): "There is often much of value to be found in treatises on institutions that are now suppressed. For instance, *retrait lignager* is abolished, nevertheless the solutions given by our ancient authors, on the effects of this *retrait*, can be of service to us in deciding similar questions arising in our day respecting *retrait successoral*, *retrait* of litigious rights, and *retrait d'indivision*. They are, in reality, rights of the same nature and produce the same consequences." And the learned professor adds that in matters of *retrait successoral* he adopts as his guide Tirangeau's treatise on *retrait lignager*. And Demolombe, 4, des suc. nos. 6, 8, says, in the same sense, that one is justified, in matters of *retrait successoral*, in invoking the application of the principles which governed *retraits* in general in the ancient jurisprudence. Besides this doctrine is generally admitted, Bourjon, Vol. 1, p. 1053. "When a first purchaser has sold to a second . . . the *retrait*, although it reacts upon the second purchaser, is exercised against the first contract of sale and not the second." And at pages 105 *et seq.* "Notwithstanding the sale made by a first purchaser of a *propre*

(*subject to retrait*), the action of *retrait* should always be instituted against him, the first purchaser, because it is by his contract or deed of acquisition the *heritage propre* has gone out of the family. We will see by the following propositions, the other formalities of such *retrait* and how it affects the second purchaser, which are based upon the fact that the action for *retrait* is mixed, that it arises from the contract made with the first purchaser, against whom there is a personal recourse (*une personnalité*) to which he always remains subject . . . " But this first purchaser, being no longer in possession of the *heritage* for which he is sued *en retrait*, should denounce the action taken against him, and if he neglects to do so, his negligence does not affect or injure the *retrayant* who may ignore this sale and who is only obliged to take action against the first purchaser; nevertheless, if the second purchaser and his right are known to the *retrayant*, he may, in order to accelerate matters, implead him in the case in order to have the judgment to be rendered against the first purchaser declared executory against him (*commune avec lui*). Again, the omission on his part to denounce the action *en retrait* taken by him would in no way affect (*ne donnerait aucune atteinte à*) his right which militates against the first purchaser and which he has fully preserved by the suit he has taken against him. It would be the same if the purchaser during the year of the *retrait* (*lignager*) had been dispossessed of the *heritage* by a *décret* executed against him at the suit of one of his creditors. The publicity of this *décret* does not affect the rights of the *retrayant*, who is always justified (*fondé*) in saying that he recognises only the first purchaser; therefore he can in this case, also, proceed and act against him notwithstanding the *décret* made of the object of the *retrait*. In one and the other case, the *retrait* adjudged is only executed against the first purchaser; it is however prudent, although not necessary to denounce this execution to the second purchaser, as we have already said with regard to the suit (*demande*), which influences the execution now under consideration (having heretofore only examined or considered as to the suit), and if there be a difference of price, the indemnity (*garantie*) depends upon circumstances. The execution of such a *retrait* being made against the first purchaser, in the hypothetical case under consideration, namely, when he, on his part, has resold the *heritage* within the year of the *retrait* (*lignager*), this execution militates against the second purchaser, against whom thereafter it will be only neces-

sary to use the formalities of any ordinary suit in demanding that, in virtue of the execution of the *retrait*, such judgment be declared executory (soit *déclaré commune avec*) against him. Such being declared, the judgment ordering *retrait* is executed against him; but this form is necessary for the execution *réelle*, otherwise it would no longer be a judicial but a military manner of execution."

Pothier, des *Retraits* No. 17: "The action is personal-real (*personnelle réelle*) because the law in burdening the stranger purchaser with this obligation, affects or charges at the same time, the *heritage* acquired by him, with the fulfilment of this obligation. The ownership of this property is merely transferred to him subject to the *retrait*, and he cannot consequently transfer it to others without his incumbrance (charges). *Nemo plus juris in alium transferre potest quam ipse habet*. Therefore, as long as the right of *retrait* lasts, the *lignagers* can institute this action not only against the person who has purchased from their relative, but also any person to whom it may have since passed and in whose possession it is." And at No. 26: "The action is personal real, *in rem scripta*, and it follows the possession." No. 189, "When, before any demand *en retrait* has been made upon the stranger purchaser, he has alienated the *heritage* subject to the *retrait*, the *lignager* has the option of suing *en retrait* either the purchaser or the third person. This is a personal real action which arises from the obligation *ex quasi contractu* undertaken at the time of acquisition by the stranger purchaser towards the *lignagers*, to transfer his bargain to any one of them willing to accept it and abandon to him the *heritage*; it is to the warranty of this obligation that the law affects this *heritage*. This action, as personal, can be instituted against the stranger purchaser, who is the real debtor and who could not, by alienating the *heritage*, relieve himself of the obligation to abandon it to the *lignager* who might wish to exercise the right. This action, as *real*, can be instituted directly against the third party in possession, the *heritage* being by law subjected to the accomplishment of the obligation."

And at paragraph 190, Pothier says that when the defendant in a suit for *retrait* pleads that he has resold to a third person it is equitable that the plaintiff should be sent back to take his recourse against such third person (this applies to the case of *retrait lignager* where only a determinate piece of property is in

question, and which has been resold in its entirety. Pothier, *Introd. au Cout. d'Orléans*, p. 651. But if one of the children had ceded his portion to a stranger, the other children can exclude this stranger from the partition by reimbursing him the price of the cession or sale, (*Bourjon*, Vol. 1, p. 820). And in his chapter on *retrait lignager*, p. 1032, he says: "In case the vendor has co-heirs and consequently the sale comprises only a share of the succession, each co-heir has the right to withdraw (*retrayer*) the whole of such share when the sale is made to a stranger, and such *retrait* is subject to no formalities and is preferable to the *retrait lignager*. (This is evidently the *retrait successoral*.)" Ferrière, under art. 129 of the *Cout. de Paris*, says: "The action (*en retrait lignager*) can be instituted against the person in possession of the heritage at the time of the institution of the action, or against the first purchaser, under the provisions of the *Cout. de Reims* and others; but in those *Coutumes* that are silent, it rather seems that the action should be instituted against the person in possession, the more so as the conclusions for *retrait* cannot be taken against a person no longer in possession." The author is here treating of an action *en retrait lignager* against a determinate and distinct immovable. Duplessis, Vol. 1, p. 286: "When the purchaser has resold the *heritage* to a third person . . . a distinction has to be made as whether it was so resold before or after the suit for *retrait* was taken; in the former case, the *retrayant* can always apply to the purchaser (because he could not sell to the prejudice of the suit and the litigious flaw); but in the latter case (resale before action taken), then the *retrayant* must apply to the new purchaser and last holder of the property, it is *actio in rem scripta*. And in both cases he has only to reimburse the price of the first purchase saving to the second purchaser his recourse against the first for the surplus he has paid. But it may be asked whether, in the second case, the *retrayant* is absolutely forced to look to the last purchaser only, without the option of a recourse to the first, for truly it may be said on the one hand that the action for *retrait* being *in rem scripta* should only be instituted against the holder, and to what could the first purchaser be condemned since he no longer possesses the piece of property; if he has disposed of it, he had the right to do so, no action having yet been taken against him. On the other hand it may be answered, that the action for *retrait* being mixed and arising out of a contract made with the first purchaser, there is a personal liability (*personnalité*) to which he always remains subject . . . therefore I hold that in this case the *retrayant* has the choice of acting against either the first or the second purchaser; it avails nothing to say that, since the first is no longer the holder, no condemnation can run against him, for by the action his right is resiliated at the same time as that of the second, and, in fact, it is generally admitted that such judgment should be given in the first instance.

*Grande Coutumier de France*, Edit. Laboulaye, p. 326, 336.

"*Usage, Coutume est notoire et commune observance du royaume de France et mesurement de la prévosté et viconté de Paris sont tels et tous notaires que, quand aucune personne a propre héritage à lui venu et descendu, et telle personne le vend à aultre personne, tout étrange de lui et du côté et ligne dont l'héritage lui est eschu vient un aultre dedans l'an et le jour à commencer du jour de la vendue ou dessaisine et fait ajourner l'acheteur de la vente principale pour l'avoir par retrait en lui rendant son argent . . . telle demande est recevable.*" *Item anno retractus pendente, emptor rei retrahibilis eam vendidit alteri queritur contra quem illi rem emptorem aget retrahere volens, aut contra primum aut contra secundum?* Respondetur: "En supposant que action de l'héritage se faiet contre le détenteur d'iceluy et pour ce je distingue, ou le premier acheteur l'a vendu avant l'ajournement du retrait, ou non; si primo, l'action se fera contre l'acheteur second par la dite supposition; si autem *post dictum adjournamentum*, l'action se fera contre l'acheteur premier . . . Item, le retraieur ne doubt pas estire voie de saisine et de nouvelleté, si le premier acheteur a vendu à un aultre la chose contentieuse, mais doubt faire ajourner l'acheteur et le vendeur, pour ouvrir une requeste qu'il entend faire à l'encontre d'eux tendant afin que le contrat soit mis au néant."

Art. 205 of the Coutume of Reims: "The plaintiff for *retrait lignager* has the choice either to act against the first purchaser who since has resold within the year and a day the *héritage* subject to *retrait* against the second purchaser and holder thereof, to whom it will be obliged to pay only what the first purchaser may have paid, saving to the second purchaser, his recourse against the first. Such is certainly the *Common Law of France*."

One more remark before I end. "It is a question, says Demolombe, whether the benefits arising from *retrait successoral* compensate the inconveniences resulting therefrom." And, says Laurent, "*Le retrait successoral* is purely an arbitrary law and founded on bad reasons." "It is with just cause," adds a very recent author (1893) Hue, *Com. du Code Civil*, Vol. 5, p. 383, "that it has been prescribed by the Italian Civil Code." The eminent juriconsult who presided in the Court of Appeal at Montreal at the rendering of judgment in the case of *Durocher v. Turgeon* (*loc. cit.*) evidently shared these opinions by expressing his surprise that our codifiers should have retained this *retrait*.

Under the circumstances, although, it is true, it is not a question that comes within the attributes, strictly speaking, of a Court of Justice, nevertheless we may be permitted to call the attention of the Provincial Legislature to it. It may perhaps be found expedient to abolish entirely this right of *retrait* as was done with the *retrait lignager* in 1855.

Appeal dismissed with costs.

# THE LEGAL NEWS.

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VOL. XVII.

JULY 16th, 1894.

No. 14.

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## *CURRENT TOPICS.*

Parliament has once more concluded its business without doing anything to increase the remuneration attached to the judicial office. But there seems to be a disposition to treat the members of the Supreme Court with a consideration not accorded to the provincial appeal courts. A resolution introduced on the 25th June by the Minister of Justice reads as follows: "That if any judge has held the office of judge of the Supreme Court of Canada for fifteen years, or the said office and that of judge of the Exchequer Court, or the said office and that of judge of one or more of the superior courts or of the courts of vice-admiralty in any of the provinces of Canada, for periods amounting together to fifteen years or upwards, and if such judge has attained the age of seventy years and resigns his office, he shall during the remainder of his life continue to receive his full salary, which shall be payable to him in the same manner as it was payable at the time of his resignation; provided, however, that nothing herein shall apply to a judge who has held the office of judge of the Supreme Court of Canada for a period less than five years." This proposition would enable almost the entire Supreme bench to retire without loss of any portion of their emoluments. It is doubtful whether such an inducement should be held out. It

would certainly facilitate the creation of vacancies in the court whenever the Government of the day was specially anxious that one should exist, but that is hardly a good reason for offering a special inducement to the judges generally to withdraw from work for which they may be thoroughly competent, to be replaced by others perhaps not more competent, and at a double charge to the country. The two-thirds pension allowed to judges of other courts seems to be a better system.

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Another change which more immediately concerns the Montreal and Quebec districts, is contained in the following section of a bill introduced on the 3rd July: "The last paragraph of section 4 of the *Act respecting the Judges of Provincial Courts*, chapter 138 of the Revised Statutes, is hereby repealed and the following substituted therefor: "If the Chief Justice of the Superior Court resides at Quebec, the judge residing at Montreal who is appointed by the Governor-in-Council to perform the duties of Chief Justice in the district of Montreal as it is comprised and defined for the Court of Review, or, if the Chief Justice resides at Montreal, the judge residing at Quebec who is appointed by the Governor-in-Council to perform the duties of Chief Justice in the district of Quebec as it is comprised and defined for the Court of Review, in addition to his other salary, \$1,000 per annum." The terms of the section repealed were: "The senior puisné judge residing at Quebec, if the Chief Justice resides at Montreal, or the senior puisné judge residing at Montreal, if the Chief Justice resides at Quebec, in addition to his other salary, \$1,000." The amendment precludes the senior puisné judge from succeeding to the position and salary of acting Chief Justice unless specially appointed, a change which on general principles is desirable; but in the present instance it is regrettable, inasmuch as the senior puisné judge at Montreal is peculiarly qualified for the position of acting Chief

Justice, the duties of which he has actually discharged for the past two years.

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In several particulars there was a resemblance between Lord Coleridge and our own Chief Justice, whose decease preceded by a few weeks that of his English contemporary. They were both remarkable for easy and graceful eloquence and decided literary and philosophical leanings. There appears to be also in each case a difficulty in assigning them their precise position as lawyers. The *Law Journal*, referring to the English Chief Justice, says: "The estimates which have been formed and published of Lord Coleridge's quality as an advocate and a judge, in the course of the last few days, have been numerous and bewildering. One inspired critic has been pleased to assert that the late Lord Chief Justice was merely a master of dignified and graceful platitudes; that his cross-examinations at the Bar were notoriously futile; and that his law on the Bench was 'always interesting and sometimes accurate.' This is not a character sketch, but a caricature, and a very ungenerous and unworthy one. On the other hand, we have been told by high authority, and with equal confidence, that Lord Coleridge and Lord Mansfield will occupy about the same place in the legal firmament. It is to be feared that this estimate is coloured by the warmth and sorrow of an *éloge*. It is useless to compare Coleridge with Cairns or Jessel even, much more with the master intellect of the creator of English commercial jurisprudence. That he had high legal aptitudes is certain, but that he did not care or trouble to cultivate them to the extent which would entitle him to be ranked among supreme lawyers, is equally true. The verdict of legal posterity on the late Chief Justice will probably be a compound of the views which lie between these two extremes. Lord Coleridge was not the equal of Sir Henry Hawkins as a cross-examiner. We are satisfied that Sir Henry would

have broken the Claimant down, which Lord Coleridge certainly did not. But no student of his forensic duels can doubt that he was a skilful handler of the foils. His speeches contained less 'grit and iron' than those of Cockburn; but he was unquestionably a more polished advocate; and so on through the whole gamut of forensic and judicial attributes. On one point Lord Coleridge's supremacy will not be challenged—he was the most eloquent speaker whom the Bar, in this century at least, has produced."

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## SUPREME COURT OF CANADA.

13th March, 1894.

Nova Scotia.]

MACK V. MACK.

*Trustee—Administrator of estate—Release to, by widow and next of kin—Misrepresentation—Rescission of deed of release—Laches.*

M., administrator of his brother's estate, obtained from the widow and next of kin of the testator a release of all their respective interests in the real and personal property of the deceased, representing to them that if the property was sold at auction it would be sacrificed, and the most could be made of it by his having full control. The testator died in 1871, and from that time until his own death in 1888 M. held the property as his own, and did nothing with it as executor either by passing accounts in the Probate Court or attempting to wind up the estate. During that period he wrote a number of letters to the testator's widow, in most of which he stated that he was acting for her benefit in regard to the property and would see that she lost nothing by his having it, and in 1881 he paid her \$1,000. Prior to this payment, it would appear from his letters that the widow had repented handing over the estate, and kept urging him to give her a statement of his dealings with the property, and early in 1881 he wrote that it would take two years more to enable him to know how the business stood, but no such statement was given, and after his death the widow brought an action against his executors asking for an account of the estate and M.'s dealing therewith and payment of her share, and to have the said

release set aside. The defendants set up the release as an answer to the claim, and also pleaded that plaintiff was precluded by *laches* from maintaining the action.

*Held*, affirming the decision of the Supreme Court of Nova Scotia, Gwynne, J., dissenting, that the release should be set aside; that the widow in signing it was ignorant of the state of her husband's business and was dominated by the stronger will of M.; and that M. after the release had admitted his liability to her as trustee, and promised to account to her for the property without regard to his legal title, and paid money to her on account of such liability.

*Held*, further, that the plaintiff was not precluded by delay in pressing her claim from taking these proceedings; that the delay was due to M. himself, who, by his promises to render a statement of the affairs of the estate, had induced her to refrain from taking proceedings; and that M. by his correspondence had elected to divest himself of his legal title and must be treated as a mere trustee for the widow, and there is no statute of limitations to bar a *cestui que trust* from proceeding against his trustee for breach of an express trust, nor is there in Nova Scotia any prescription in favour of an administrator or executor against a beneficiary bringing suit for his share of an estate, except in the case of a legatee.

Appeal dismissed with costs.

*Borden*, Q.C., for the appellant.

*Newcombe* and *McInnes*, for the respondents.

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13th March, 1894.

Exchequer Court—Admiralty.]

S. S. SANTANDERINO v. VANVERT.

*Admiralty—Collision—Defective steering gear—Prompt action—  
Questions of fact—Appeal on.*

The S.S. "Santanderino" was entering Sydney harbour, where the barque "Juno" was lying at anchor, about 200 yards to the right of the centre of the channel. She was making eight or nine knots, with a slight list to port, and the Juno was on her starboard bow. As she came near the Juno her head fell off to port, and in porting the helm she came too much to starboard,

and in putting the helm to starboard to put her straight on her course it was found that the wheel would not work. She was then 200 to 250 yards from the Juno and on her port quarter. The third officer, who was at the wheel, told the master that it would not work, and the master sent the second and third officers below to see what was the matter and inform the engineer, at the same time telegraphing to stop the engine. He then ordered the port anchor to be let go, the engine to be reversed and then to be reversed at full speed, but before that could be done the steamer struck the Juno on the port side.

In an action for damages caused by this collision it appeared that the defect in the steering gear was caused by the breaking of a small pin called the taper pin, which caused a longer pin to drop out and prevented an eccentric rod, by which the motion was imparted, from working. The judge in Admiralty found that the steering gear was constructed under a proper patent and was in good order when the steamer left Liverpool for Sydney, but that the collision was due to want of prompt action on the part of the officers of the steamer when it broke down.

*Held*, affirming the decision of the Judge in Admiralty (3 Ex. C. R. 379), Sedgewick and King, J J., dissenting, that though it was doubtful that the evidence was sufficient to support this conclusion, it was not so clearly erroneous that an appellate court would reverse it, the decision depending only on a question of fact.

Appeal dismissed with costs.

*Newcombe & McInnes*, for the appellants.

*Borden, Q.C.*, for the respondents.

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## QUEEN'S BENCH DIVISION.

LONDON, June 18, 1894.

LAWSON V. READ. (29 L. J. 386).

*False Imprisonment—Action for—Army Act, 1881 (44 & 45 Vict., c. 58), s. 156, subs. 1, 2, 4—Offence of purchasing from soldiers—Accused taken into custody—Police protected.*

This was an appeal by a sergeant of police, defendant in an action of false imprisonment, against the judgment of a County Court judge in favour of the plaintiff.

Section 156 of the Army Act, 1881, imposes penalties on pur-

chasing from soldiers regimental necessities, equipments, stores, &c., and subsection (2) provides that 'where any such property . . . is found in the possession or keeping of any person, such person may be taken or summoned before a Court of summary jurisdiction . . . , ;' while subsection (4) enacts that 'a person found committing an offence . . . may be apprehended without warrant and taken, together with the property which is the subject of the offence, before a Court of summary jurisdiction. . . .'

On November 19, 1893, a soldier asked Laws (the plaintiff), a youth of seventeen, to buy a military overcoat for 5s., saying that he had a right to sell it, and would have another as soon as he returned to his regiment. The plaintiff bought the coat. On the evening of Saturday, November 25, the defendant, a sergeant of police, spoke to the plaintiff on the subject, and the plaintiff admitted that he had bought the coat of a soldier and had it at his lodgings, and produced it. The defendant then took him into custody, and the plaintiff was locked up at eight o'clock that night till eleven o'clock next day (Sunday), when he was released on bail. He was subsequently brought before a Court of summary jurisdiction and fined 10s. and costs. The plaintiff then brought his action in the County Court, claiming 20*l.* damages for false imprisonment. The learned County Court judge held that the defendant had not justified his arrest of the plaintiff, who could not have been 'found committing' the offence of buying the coat as the purchase had taken place six days before. His judgment was for the plaintiff, with 5*l.* damages.

The COURT (CAVE, J., and COLLINS, J.) held that the judgment below must be reversed. The plaintiff had been found in possession of the coat, and the defendant, therefore, had a right to take him before a Court of summary jurisdiction. Police officers had discretion under the statute to take offenders into custody, and were not liable to an action of this kind, although such discretion be exercised unwisely or even harshly. Upon principle the defendant was right in what he did, although he might have adopted the more lenient procedure of issuing a summons.

Appeal allowed.

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## COURT OF APPEAL.

LONDON, June 23, 1894.

*Before* LINDLEY, L. J., LOPES, L. J., DAVEY, L. J.

CARTER v. KIMBELL, (29 L. J. 398.)

*False imprisonment—Reasonable suspicion.*

Motion for new trial.

This action was brought for damages for false imprisonment. The plaintiff was the owner of a watch which was numbered 26,939, and might properly be described as a 'gent.'s silver English lever watch'; it had one of its hands broken. The defendant was a pawnbroker. The plaintiff had more than once pawned his watch with the defendant. On October 24, 1893, the watch being then out of pawn, the plaintiff sent it over to the defendant's shop by a friend named Harding to raise some money on it. While the defendant was examining the watch he had before him a police notice containing a list of articles which had recently been stolen. The notice requested that any person offering any of the articles thereunder mentioned in pledge or for sale might be detained (35 & 36 Vict. c. 94, s. 34) and a constable sent for, or any information transmitted to the nearest police station. Among the articles described in the notice was the following: 'Gent.'s silver English lever watch, 26,939,' which was stated to have been stolen on September 5, 1893. On observing the identity of the numbers the defendant interrogated Harding, who said that he got the watch from the plaintiff. The defendant then sent Harding to fetch the plaintiff, who came to the defendant's and explained, as the fact was, that the watch had been left him by his uncle. The defendant thereupon gave the plaintiff into custody, and he was taken to the police station.

The action was tried before POLLOCK, B., and a special jury on May 31. It was admitted by the plaintiff at the trial that the defendant had acted *bona fide*, but it was said that he had no reasonable suspicion, within section 34 of the Pawnbrokers Act, 1872, such as would justify him in detaining the plaintiff. That section provides that 'in any case where, on an article being offered in pawn to a pawnbroker, he reasonably suspects that it has been stolen or otherwise illegally or clandestinely obtained,

the pawnbroker may seize and detain the person and the article, or either of them, and shall deliver the person and the article, or either of them, as soon as may be into the custody of a constable." The learned judge considered that there was no evidence to go to the jury, and gave judgment for the defendant.

The plaintiff now applied for a new trial on the ground of misdirection.

Their LORDSHIPS refused the application. They held that the plaintiff's admission that the defendant had acted *bona fide* was almost conclusive to show that the defendant had a reasonable suspicion that the article had been stolen or clandestinely obtained. If the question had been left to the jury, and they had found for the plaintiff, the verdict could not have been sustained. Their lordships, however, desired to express no opinion as to the correctness of *Howard v. Clarke*, L. R. 20 Q. B. Div. 558, so far as it laid down that the question of reasonable suspicion under the Act was for the judge.

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#### COURT OF APPEAL.

June 21, 1894.

Before LINDLEY, L. J., LOPES, L. J., DAVEY, L. J.

(GUILD V. CONRAD, (29 L. J. 398.)

*Statute of Frauds, s. 4—Promise to make good the debt, default, or miscarriage of another—Indemnity—Guarantee.*

Motion for new trial.

The plaintiff having agreed to extend a bill credit to a foreign firm in which the defendant took an interest up to a certain limit, on the terms of the defendant giving a written guarantee to the plaintiff for the amount, the foreign firm exceeded the limit, and the plaintiff declined to accept any more of their bills without a further agreement. The defendant then gave to the plaintiff a verbal undertaking, which the Court held upon the evidence was not an undertaking to pay the plaintiff if the foreign firm did not pay, because there was no expectation on the part of either party that the foreign firm would be able to pay, but was an undertaking to provide funds to enable the plaintiff to meet the bills of the foreign firm in any event. To an action upon this

undertaking the defendant pleaded that it was a promise to make good the debt, default, or miscarriage of another within section 4 of the Statute of Frauds, and required to be evidenced in writing. **MATHEW, J.**, held that it was a promise to indemnify, to which the statute did not extend. The defendant applied for a new trial on the ground of misdirection.

Their LORDSHIPS refused the application. *Thomas v. Cook*, 8 B. & C. 728, decided that the statute did not apply to a promise to indemnify. That case had been followed in many cases, of which the two latest were *Wildes v. Dudlow*, L. R. 19 Eq. 198, and *In re Bolton*, 8 Times Rep. 668, and notwithstanding *Green v. Cresswell*, 10 A. & E. 455, it was still good law. There was a material difference between a promise to pay a creditor if the principal debtor made default and a promise to indemnify against a liability, without regard to the question whether anybody else made default or not.

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#### MARRIAGE AND DOMICILE.

The following opinion given by Mr. David Mills, M.P., has been communicated for publication :—

4 July, 1894.

DEAR SIR,—I have considered with care the marriage articles signed by L. N. Mercier and Demoiselle E. Blais, which were drawn up and signed in the province of Quebec. At the time these articles were signed, Mr. Mercier was a resident of Ontario and Miss Blais was a resident of Quebec.

It would seem the parties contemplated residing after marriage in the province of Ontario. Apart from any contract or agreement between the parties expressing a contrary intention, the effect of marriage upon the proprietary rights of the wife depends upon the law of the husband's domicile under the law of England, and, in this respect, the law of Ontario is the same. The matrimonial domicile is that of the husband at the time of marriage, unless there is a *bona fide* intention at the time of marriage to acquire another domicile immediately after, and this intention is known to the wife. In that event the proprietary rights of both will be adjudged by the domicile about to be acquired.

*DeSerre v. Clarke*, L. R. 18 Eq., p. 588.

*Colliss v. Hector*, L. R. 19 Eq., p. 334.

*Harvey v. Farnie*, 8 Ap. Cas., p. 43.

But this rule does not prevent the parties by contract adopting some other law as the one regulating their proprietary rights, and in this case that has been done. These marriage articles are drawn in Quebec, and in conformity with the requirements of the law of Quebec, and clearly contemplated a settlement in conformity with the law of that province.

I think the law as laid down in *Ex parte Sibeth*, 14 Q. B. D. 417, is strictly applicable here. There the husband was trustee for the wife, and as such, was in possession of her separate property. The husband was at the marriage a domiciled Englishman. The wife was a Prussian subject residing at Cologne, where the Code Napoléon was in force. The marriage contract was executed by husband and wife in the form required by the Code Napoléon. The Master of the Rolls, Brett, said the marriage contract must be construed according to the law of Prussia. The same rule is laid down in *Hernando v. Sawtell*, 27 Ch. D., p. 284, and in *Chamberlain v. Napier*, 15 Ch. D., p. 614.

It is true that as to forms and solemnities required in the transfer of immovable property, the instrument must conform to the law of the place where the property is situated; compliance with the *lex actus* is insufficient. *Adams v. Clutterbuck*, 10 Q. B. D. 403. There is nothing in these articles contravening that rule. I think this marriage settlement is one that the courts of Ontario will uphold and enforce.

Yours very truly,

DAVID MILLS.

P. A. CHOQUETTE, Esq., M.P.

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#### JUDICIAL DECISIONS IN THE UNITED STATES.

Mr. John F. Dillon, the well-known author, has recently written a work entitled "Our Law in its Old and New Home." In the course of it he makes the following valuable observations upon United States case law:—

The character of many recent American reports has deteriorated from several causes. To two of these I shall now allude, because they arise from mistaken views and practices of the judges themselves, and are, therefore, readily remediable.

Most of our appellate courts are crowded with causes, and the effect upon the judges is, that they too often feel it to be an over-

pressing, paramount, all-absorbing duty to clear the docket. This mistakenly becomes the chief object to be attained—the primary, instead of a quite subordinate, consideration. In the accomplishment of this end, the judges are as impatient of delay as was the wedding-guest in the Rhyme of the Ancient Mariner. Added to this, a majority of the appellate judges generally reside elsewhere than at the capital or place where the courts are held, and the desire is constantly felt to bring a laborious session to an end as speedily as possible, in order that they may rejoin their families, and do their work in the fatigue-dress of their libraries, rather than under the necessary restraints of the term. They begrudge the time necessary for full argument at the bar. They dislike to hear counsel at length. They prefer to receive briefs. As a result, two practices have grown up too generally throughout the country, which have, as I think, done more to impair the value of judicial judgments and opinions, than perhaps all other causes combined.

*The first is, that the submission of causes upon printed briefs is favored, and oral arguments at the bar are discouraged, and the time allowed therefor is usually inadequate.*

On this subject I hold very strong opinions; but also hold that no opinion can be too strong. As a means of enabling the court to understand the exact case brought thither for its judgment; as a means of eliciting the very truth of the matter both of law and fact, there is no substitute for oral argument. None! I distrust the soundness of the decision of any court, of any novel or complex case, which has been submitted wholly upon briefs. Speaking, if I may be allowed, from my own experience, I always felt a reasonable assurance in my own judgment when I had patiently heard all that opposing counsel could say to aid me; and a very diminished faith in any judgment given in a difficult cause not orally argued. Mistakes, errors, fallacies and flaws elude us, in spite of ourselves, unless the case is pounded and hammered at the bar. This mischievous substitute of printer's ink for face-to-face argument, impoverishes our case-law at its very source, since it tends to prevent the growth of able lawyers, who are developed only in the conflicts of the bar, and of great judges, who can become great only by the aid of the bar that surrounds them. What lawyer will prepare for a thorough argument at the bar when he knows that he will not have the time to present it. It was not thus until a recent period. Nor are

these views at all novel. Lord Coke refers to the benefits of oral arguments in language the most solemn and impressive. In cases of difficulty, he says: "No man alone with all his uttermost labors, nor all the actors in them, themselves by themselves out of a court of justice, can attain unto a right decision, *nor in court without solemn argument, where I am persuaded Almighty God openeth and enlargeth the understanding of those desirous of justice and right.*" This, I declare unto you, I do verily believe.

Formerly, whenever a new or difficult question arose, the judges of England invited argument and reargument, *always in open court*; and in the earlier days of the law, the matter was not only debated at the bar by the counsel for the parties, but was afterwards discussed by the judges openly at a time prefixed in the presence of the barristers and apprentices: "A reverend and honorable proceeding in law, a grateful satisfaction to the parties, and a great instruction to the studious hearers." Truth is not apt to enter where she is not received with welcome and hospitality.

If our case-law is not to go on deteriorating, we must revive the former appreciation of the value of oral arguments. It is these that must be favored, and it is the submission wholly on briefs that ought to be discouraged.

The other practice among some, I fear many, of our appellate courts, which injuriously affects our case-law, is *the practice of assigning the record of causes submitted on printed arguments to one of the judges to look into and write an opinion, without a previous examination of the record and arguments by the judges in consultation.*

This course ought to be forbidden, peremptorily forbidden, by statute. What is the most difficult function of an appellate court? It is, as I think, after the record is fully opened, and the argument understood, to determine precisely upon what point or points the judgment of the case ought to rest. This most delicate and important of all judicial duties ought always to be performed by the judges in full conference *before* the record is delivered to one of their number to write the opinion of the court, which, when written, should be confined to the precise grounds thus pre-determined. In respect to oral arguments, the time allowed therefor, the willingness to hear counsel, and full conferences among the judges in the presence of each other prior to decision or assigning the record to a judge to write the opinion, the Supreme Court of the United States is a model for every appellate tribunal in the country.

When the ideal of legal education shall be the mastery of principles, so that the first impulse of the lawyer in cases not depending upon local legislation will be to find the "principle" and not the "case" that governs the matter in hand; when arguments at the bar shall be mainly directed, first to an ascertainment of the peculiar and controlling facts of the case under consideration, and then to pointing out the principles of law which apply to this precise state of facts, each of which operations requires the disciplined exercise of intellectual qualities of a high order; when the bench shall be constituted of the flower of the bar, and appellate judgments shall not be given without a previous conference of the judges at which the grounds of the judgment shall be agreed upon before the record is allotted for the opinion to be written; when opinions shall be rigidly restricted, without unnecessary disquisition and essay-writing, to the precise points needful to the decision, we shall have an abler bar, better judgments, and an improved jurisprudence, in which erroneous and conflicting decisions will be few, and reduced to the minimum.

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#### GENERAL NOTES.

**CHILDREN'S NAMES.**—The clergy have long exercised a quasi-paternal authority over the selection of the Christian names of their parishioners' children. But it is curious to find a registrar of births refusing to give way to a father's demand to have his child's name registered as 'Roseanne,' and insisting that it should be 'Rose Anne,' although he was told that a legacy depended on the child being registered as desired. The father took his grievances to Mr. Haden Corsor, who intimated that there was a remedy by *mandamus*, but we should hardly think that the official will be so ill-advised as to bring this writ down upon him, or to dictate further to the British public as to the way they are to spell their names.—*Law Journal (London).*

**STYLE.**—If a man were to give another an orange (remarked a wag) he would merely say, 'I give you this orange'; but when the transaction is intrusted to the hands of a lawyer to put it in writing, he adopts this form: 'I hereby give, grant and convey to you all and singular my estate and interest, right, title, claim and advantage of and in the said orange, together

with all its rind, pulp and pips, and all right and advantage therein, with full power to bite, cut, suck, and otherwise eat the same, or give the same away, as fully and effectually as I, the said A B C, am now entitled to bite, cut, suck, or otherwise eat the same orange, or give the same away, with or without its rind, skin, juice, pulp and pips, anything hereinbefore or hereinafter, or in any other deed or deeds, instrument or instruments of what nature or kind soever to the contrary in any wise notwithstanding.'

**LAW OF THE BALL ROOM.**—The *Australian Law Times* discusses the question whether or not a young lady, who breaks her leg at a dance, can maintain an action against her partner on the ground that it was caused by his clumsiness. The writer is inclined to think that a man who asks a girl to dance does not undertake to return her to her chaperon in as good order and condition as he receives her,—“Act of God and the Queen's enemies excepted,”—but that at most his liability is that of a gratuitous bailee, not extending beyond gross negligence; or, looking at the case from another side, that there is no implied warranty on his part that he is reasonably fit for the purpose for which he offers himself as a partner for a dance, as there is no sufficient consideration moving from her to him to support such a warranty. A further point raised is whether or not she did not voluntarily assume the risk of his unfitness. The writer adds that these questions were very fully gone into “in the somewhat analogous case of the bailment of a cab-horse, *Fowler v. Locke*, L. R. 7 C. P. 272, 9 C. P. 751, note, 10 C. P. 90.”

**LAWYERS' CLERKS IN FICTION.**—Mr. Spray, hon. treasurer of the United Law Clerks' Society, says the *Daily News*, has made diligent search in the novels of Scott and Thackeray, but has not found, among all their personages, a single example of a lawyer's clerk. And he has been led to doubt whether any writer of note before Dickens has repaired the omission. Dickens, however, has made ample amends. He knew lawyers' clerks well, and has presented us, so Mr. Spray finds, with no fewer than sixteen of them, all with different characteristics, not to speak of others casually alluded to. Mr. Swiveller, who does not remember? And John Wemmick, and Lowten, and Mr. Guppy, and Uriah Heep? In one respect, Mr. Spray is afraid that lawyers' clerks have made no progress since Charles Dickens's days—that is, in

the matter of remuneration. The spread of education and the higher standard of education attained by the people of this country, keep, we are told, the market overstocked with the material out of which lawyers' clerks may be formed. The lad whose parents cannot afford to apprentice him when he leaves school, now competes with the class whose parents (foolishly, as Mr. Spray thinks) are too proud to put their sons to a trade. And so to-day it requires greater effort, and a higher intelligence than ever before, for a clerk to obtain a post in a lawyer's office.

**CORONER'S INQUESTS.**—A medical contemporary recently drew attention to the disagreeable and sometimes dangerous nature of the duty which the law imposes upon a coroner and his jury through the necessity of their viewing the body on which an inquest is held. This proceeding, which from time immemorial has formed part of every inquisition of death, is still obligatory under the Coroner's Act, 1887, except when the High Court orders an inquest to be held, either because the coroner has refused to hold one, or because, for some such reason as fraud, rejection of evidence, irregularity or insufficiency of inquiry, it is desirable in the interests of justice that another inquest should be held. In neither of these cases is it necessary, unless the Court should otherwise order, to view the body. The reason for the view in ancient times is obvious; it was to assist the jury in coming to a conclusion as to the cause of death. "On the view of the bodies," says the statute *De Officio Coronatoris* (4 Edw. I., ss. 1, 2), "it is to be seen whether they were drowned, or slain, or strangled, by the sign of a cord tied straight about their necks, or by marks on any of their limbs, or any other hurt found upon the bodies." In modern days the view is, for this purpose, nothing but a formality; for, when there is any doubt regarding the cause of death, modern juries rely, not on their own examination, but on medical evidence. At any rate, so far as a view may be requisite for the purpose of identification, there is no need for the jury to take part in the proceeding.—*Law Journal (London)*.

**THE COST OF A WITNESS.**—Mr. Justice Hawkins, whilst hearing a case in the Queen's Bench Division, remarked to a witness: 'You seem very fond of talking. Let me tell you that time here is very valuable, and while you are talking it costs about half-a-crown every minute. Someone will have to pay it.'

# THE LEGAL NEWS.

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VOL. XVII.

AUGUST 1st, 1894.

No. 15.

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## SUPREME COURT OF CANADA.

May 22, 1894.

FRANK V. SUN LIFE ASSURANCE CO.

[Ontario.]

*Life insurance—Payment of premium—Contract dehors the policy—  
Avoidance of policy.*

A policy of life insurance contained no condition making it void in case of non-payment of premiums or of any note, etc., given for a premium. The first premium was not paid in cash, but the assured signed and gave to the company an agreement in the form of a promissory note payable at a certain time for part, and a like agreement, payable at a later period, for the other part, each of said documents containing an undertaking by the assured that if it was not paid when due, the policy should be void. The assured died after the time for payment of the first agreement, but before the second had matured, and leaving the first unpaid.

*Held*, affirming the decision of the Court of Appeal for Ontario (20 Ont. App. R. 564) that by the failure to pay the part of the premium as agreed by the overdue instrument, the policy was void.

Appeal dismissed with costs.

*Wilkes, Q.C.*, for the appellant.

*Aylesworth, Q.C.*, for the respondents.

May 23, 1894.

## SNETZINGER v. PETERSON.

Ontario.]

*Arbitration and award—Submission—Question of fact—Second award—Arbitrator functus officio.*

S. and P. were engaged in business together, under a written agreement, in the packing and selling of fruit, and a dispute having arisen as to the state of accounts between them, a third party was chosen to enable them to effect a settlement. S. claimed that such third party was only to go over the accounts and make a statement, while P. contended that the whole matter was left to him as an arbitrator.

The arbitrator having gone over the accounts made out a statement showing \$235 to be due to S. Some time after he presented a second statement showing the amount due to be \$286. S. was given a cheque for the latter amount, which he claimed to be only taken on account, and he afterwards brought an action for the winding up of the partnership affairs.

*Held*, affirming the decision of the Court of Appeal for Ontario, that whether or not there was a submission to arbitration was a question of fact as to which this Court would not interfere with the finding of the trial judge that all matters were submitted, confirmed as it was by the Divisional Court and by the Court of Appeal.

*Held*, further, that there was a valid award for \$235; that having made his award for that amount, the arbitrator was *functus officio* and the second award was a nullity; and that the Divisional Court was wrong in holding that as P. relied only on the second award, the judgment should be against him on the case as claimed by S.

Appeal dismissed with costs.

*Riddell*, for the appellant.

*McCarthy, Q. C.*, for the respondent.

May 8, 1894.

## MAYES v. THE QUEEN.

Exchequer Court.]

*Contract—Public work—Special quality of timber—Inspection—Change in terms of contract—Authority of engineer—Delay.*

M. contracted with the Dominion Government to build a bridge in connection with a railway under construction in Nova

Scotia. The contract called for the use of creosoted pine timber, of which the creosoting could only be done in S. Carolina. By one clause in the contract no change could be made in its terms without an order-in-council therefor, and by another clause M. was not to bring any suit or proceeding for damages caused by delay.

The timber was procured in S. Carolina, and M. wrote to the engineer asking for an inspection. The engineer undertook to send an inspector to S. Carolina, but neglected to do so for some weeks, and M. was put to greater expense in transporting it to Nova Scotia by reason of the delay. Having proceeded against the Crown for damages, a demurrer was filed to his petition of right.

*Held*, affirming the decision of the Exchequer Court (2 Ex. C. R. 403) that by the express terms of the contract the Crown was not liable; that the engineer could not bind the Crown by entering into a supplementary contract for inspection, and that M. had, by his covenant, no cause of action based on delay.

Appeal dismissed with costs.

*Pugsley, Q. C.*, for the suppliant.

*W. H. B. Ritchie*, for the Crown.

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May 1, 1894.

Nova Scotia.]

CITIZENS' INSURANCE CO. v. SALTERIO.

*Fire insurance—Condition in policy—Assignment of policy—Change of title in property insured.*

A condition in a policy of insurance against fire provided that the policy should not be assignable without the consent of the company indorsed thereon; that all incumbrances should be notified to the company within fifteen days; and in the event of any sale, transfer, or change of title in the property insured, the liability of the company should thenceforth cease. S., the insured under this policy, gave a chattel mortgage to a creditor of all his stock in trade insured thereby, and also "all policies of insurance on said stock and all renewals thereof." The consent of the company to the giving of this mortgage was not indorsed on the policy.

*Held*, reversing the decision of the Supreme Court of Nova Scotia, that, as the chattel mortgage and subsequent transactions showed that S. intended the policy to pass to the creditor, there was a breach of the condition, and the policy was void.

*Held*, further, that though the chattel mortgage was not a "sale" or "transfer" of the insured property within the meaning of the condition, it was a "change of title" therein which freed the company from liability; and it was also an "incumbrance" even if the condition meant an incumbrance on the policy.

Appeal allowed with costs.

*Newcombe, Q.C.*, for the appellants.

*Chisholm*, for the respondent.

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May 1, 1894.

Nova Scotia.]

STUART v. MOTT.

*Res judicata—Different causes of action.*

S., in 1883, brought a suit for specific performance of an alleged verbal agreement by M. to give him one eighth of his, M's interest in a gold mine. At the hearing M. denied the alleged agreement, but admitted that in order to prevent S. from acting in the interest of rival mine owners he had promised to give him one eighth of his interest in the proceeds of the mine when sold. Judgment was given against S. in the suit on the ground that his alleged agreement was within the Statute of Frauds and void for not being in writing. Some years afterwards, the mine having been sold, S. brought another action against M. for payment of the share in the proceeds which M. had admitted he promised to give him.

*Held*, reversing the decision of the Supreme Court of Nova Scotia (24 N. S. Rep. 526) that the judgment in the former suit for specific performance was not *res judicata* of the claim made by S. in his subsequent action.

Appeal allowed with costs.

*Osler, Q.C.*, and *Newcombe, Q.C.*, for the appellant.

*Borden, Q.C.*, and *Mellish*, for the respondent.

May 1, 1894.

Ontario.]

CITY OF TORONTO v. TORONTO STREET RY. Co.

*Construction of contract—Street Railway—Permanent pavements—  
Arbitration and award.*

The Toronto Street Railway Company was incorporated in 1861, and its franchise was to last for 30 years, at the expiration of which period the City Corporation could assume the ownership of the railway and property of the company on payment of the value thereof, to be determined by arbitration. The Company was to keep the roadway between the rails and for 18 inches outside each rail paved and macadamized and in good repair, using the same material as that on the remainder of the street, but if a permanent pavement should be adopted by the corporation the company was not bound to construct a like pavement between the rails, etc., but was only to pay the cost price of the same, not to exceed a specified sum per yard.

The city corporation laid upon certain streets traversed by the company's railway, permanent pavements of cedar block, and issued debentures for the whole cost of such work. A by-law was then passed charging the company with its portion of such cost in the manner and for the period that adjacent owners were assessed under the Municipal Act for local improvements. The company paid the several rates assessed up to the year 1886, when they refused to pay on the ground that the cedar block pavement had proved to be by no means permanent, but defective and wholly insufficient for streets upon which the railway was operated. An action having been brought by the city for these rates it was held that the company was only liable to pay for permanent roadways, and a reference was ordered to determine, among other things, whether or not the pavements laid by the city were permanent. This reference was not proceeded with, but an agreement was entered into by which all matters in dispute to the end of the year 1888 were settled, and thereafter the company was to pay a specified sum annually per mile, "in lieu of all claims on account of debentures maturing after that date, and in lieu of the company's liability for construction, renewal, maintenance and repair in respect of all the portions of streets

occupied by the company's tracks so long as the franchise of the company to use the said streets *now* extends." The agreement provided that it was not to affect the rights of either party in respect to the arbitration to be had if the city took over the railway, nor any matters not specifically dealt with therein, and it was not to have any operation "beyond the period over which the aforesaid franchise now extends."

This agreement was ratified by an act of the legislature passed in 1890, which also provided for the holding of the said arbitration, which having been entered upon, the city claimed to be paid the rates imposed upon the company for construction of permanent pavements for which debentures had been issued payable after the termination of the franchise. The arbitrators having refused to allow this claim, an action was brought by the city to recover the said amount.

*Held*, affirming the decision of the Court of Appeal, that the claim of the city could not be allowed; that the said agreement discharged the company from all liability in respect to construction, renewal, maintenance and repair of the streets; and that the clause providing that the agreement should not affect the rights of the parties in respect to the arbitration etc., must be considered to have been inserted *ex majori cautela* and could not do away with the express contract to relieve the company from liability.

*Held*, further, that as by an act passed in 1877, and a by-law made in pursuance thereof, the company was only assessed as for local improvements, which, by the Municipal Act, constitute a lien upon the property assessed but not a personal liability upon owners or occupiers after they have ceased to be such, therefore after the termination of the franchise the company would not be liable for these rates.

Appeal dismissed with costs.

*Robinson, Q.C.*, and *S. H. Blake, Q.C.*, for appellants.

*McCarthy, Q.C.*, for respondents.

May 31, 1894.

Nova Scotia.]

## CITY OF HALIFAX V. REEVES.

*Public street—Encroachment on—Building upon "or close to" the line  
—Charter of Halifax, Secs. 454-455—Petition to remove  
obstruction—Judgment on—Variance.*

By sec. 454 of the charter of the City of Halifax, any person intending to erect a building upon or close to the line of the street must first cause such line to be located by the City Engineer and obtain a certificate of the location; and if a building is erected upon or close to the line without such certificate having been obtained, the Supreme Court, or a judge thereof, may, on petition of the recorder, cause it to be removed.

A petition was presented to a judge, under this section, asking for the removal of a porch built by R., to his house on one of the streets of the city, which, the petition alleges, was upon the line of the street. A porch had been erected on the same site in 1855 and removed in 1884; while it stood, the portion of the street outside of it, and since its removal the portion up to the house, had been used as a public sidewalk; on the hearing of the petition the original line of the street could not be proved, but the judge held that it was close to the line so used by the public and ordered its removal. The Supreme Court of Nova Scotia reversed his decision. On appeal to the Supreme Court of Canada:

*Held*, that there was evidence to justify the judge in holding that the porch was upon the line, but having held that it was close to the line, while the petition only called for its removal as upon it, his order was properly reversed.

Decision of the Supreme Court of Nova Scotia affirmed, but on different grounds.

An objection was taken to the jurisdiction of the Supreme Court of Canada on the ground that the matter did not originate in a Superior Court.

*Held*, Taschereau, J., dissenting, that the court had jurisdiction. *Canadian Pacific Railway Co. v. Ste. Therese* (16 Can. S. C. R. 606) and *Virtue v. Hayes* (16 Can. S. C. R. 721) distinguished.

Appeal dismissed with costs.

*McCoy, Q. C.*, for the appellant.

*Newcombe, Q. C.*, for the respondent.

May 31, 1894.

New Brunswick.]

## PORTER v. HALE.

*Evidence—Foundation for secondary evidence—Execution of agreement—Proof of signatures—Laches—Relief asked for inconsistent with claim.*

Land was left by will to trustees in trust to divide the same or proceeds of sale thereof among testator's children. C., one of the beneficiaries, agreed to sell a part of said land to P., but the trustees and C. afterwards sold the same part to other persons. In a suit by P. against C., the trustees and the registered owners under the last conveyance, for specific performance of the agreement of sale by C., and the cancellation of said conveyance, and an injunction against further transfers, P. alleged that the trustees and other beneficiaries under the will had signed an agreement by which the land in question was to be conveyed to C. in settlement of the estate. On the hearing, secondary evidence of this agreement was tendered, and proof that C., who was the proper custodian of it, was without the jurisdiction and supposed to be in Scotland, and that P. had written to him and to his sister and one of the trustees inquiring where he was but could not get the information. None of the letters contained any reference to the agreement nor to P's object in making the inquiry. Secondary evidence having been received :

*Held*, affirming the decision of the Supreme Court of New Brunswick, that sufficient foundation for its reception had not been laid and it should not have been received; that P. should have stated in his letters that he wanted this specific document; that he should have had inquiries made in Scotland by some independent person to ascertain where C. was to be found, and if he had been found to ask him for the paper in question; and that a commission might have been issued to the Court of Session in Scotland and a commissioner appointed by that court to procure the attendance of C. and his examination as a witness.

The secondary evidence given of the execution of said agreement was that it was signed by at least four persons, but the handwriting of only two of them, including one of the trustees, was known to the witness proving it.

*Held*, that the proof of execution was insufficient to establish the case set up by P.; that an instrument signed by one only

of the trustees could convey no title, legal or equitable, to C.; and that the evidence of its contents was not satisfactory.

The alleged agreement by C., to sell the land to P., was executed in 1884, and the suit was not instituted until more than four years after.

*Held*, that the delay in taking proceedings was a sufficient answer to the suit; though P. was in possession of the land in the interval, the evidence clearly showed that it was not in the capacity of a prospective purchaser, but in that of a caretaker, having been so appointed by the trustees.

P. also claimed to be entitled to a decree for performance, in the event of the case made by his bill failing, on the ground that the testator's will had not been registered in New Brunswick as required by law, and was consequently void as against him, a purchaser from C., one of the heirs.

*Held*, that as the bill claimed title under the will, P. could not have a decree based on the proposition that the said will was void as against him and no amendment could be allowed, making a case not only at variance with, but antagonistic to the bill, especially as such amendment was not asked for until the hearing.

Appeal dismissed with costs.

*McLeod, Q.C.*, and *Palmer, Q.C.*, for the appellant.

*Weldon, Q.C.*, *Currey*, and *Vince*, for the respondents.

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May 31, 1894.

New Brunswick.]

#### SCOTT v. THE BANK OF NEW BRUNSWICK.

*Debtor and creditor—Payment to pretended agent—False representations as to authority—Indictable offence—Ratification of payment by creditor—Adoption of agency.*

S. a shipmaster, before starting on a voyage deposited \$1,000 in a bank and obtained a deposit receipt therefor which he left with R., part owner and manager of his vessel, for safe keeping. S. was absent for four years and when he returned and asked for a settlement with R., who owed him \$2,650.00 on ship's account, he found that R. had received the amount of the deposit from the Bank and applied it to his own use. To avoid proceedings against him R. gave to S. a bill of exchange on a person in

Ireland for £250 and a mortgage on an interest he claimed to have in his father's property, and S. went to sea again without stating any of these facts to the Bank. In two years he returned again and found that R. had left the country, the bill of exchange had not been accepted and nothing had been realized on the mortgage. He then demanded the amount of his deposit from the bank, which they refused to pay, and he brought an action to recover the same.

The action was twice tried. On the first trial a verdict was given in favour of S., the jury having found that when R. took the deposit receipt to the bank, with the name of S. indorsed on it, such indorsement had not been written by S., and the trial judge held that the finding was, in effect, that of forgery by R., which could not be ratified. The jury also found that the security taken by S. did not include the \$1,000. The full court ordered a new trial on the ground that the last finding was against evidence (31 N. B. Rep. 21), and an appeal from that decision to the Supreme Court was not entertained (21 Can. S. C. R. 30). On the second trial the Bank obtained a verdict which was affirmed by the full court. On appeal from the latter decision,

*Held*, affirming the judgment of the court appealed from, that the doctrine of estoppel was not involved in the case; that R. obtained the money from the Bank by falsely representing that he had authority from S.; that S., by ratifying and confirming the payment adopted the agency, and his act made the payment equivalent to one to a person having authority to receive it; and it made no difference that by his false representations R. may have committed an indictable offence.

Appeal dismissed with costs.

*McLeod, Q.C.*, and *Palmer, Q.C.*, for the appellant.

*Blair, Atty.-Gen.* of New Brunswick, for the respondent.

May 31, 1894.

New Brunswick.]

ROURKE V. THE UNION MARINE INSURANCE CO.

*Trover—Joint owners of vessel—Sale by one—Conversion—Marine Insurance—Abandonment—Salvage.*

A vessel partly insured was wrecked, and the ship's husband gave notice of abandonment to the underwriters, whose agent

caused the hull and outfit to be sold to one K. The underwriters afterwards notified the ship's husband that the vessel was not a total loss and requested him to pay the charges and take possession. He paid no attention to the notice, and K. took the vessel to a port in Maine, U. S., and attempted to repair her, and he afterwards caused her to be libelled for salvage in a United States court, and sold. R., owner of eight shares which had not been insured, brought an action against the underwriters for conversion of her interest.

*Held*, affirming the decision of the Supreme Court of New Brunswick, that the conduct of the ship's husband, who was agent for R. in respect of the vessel, precluded the latter from bringing such action; that by his notice of abandonment the underwriters became joint owners with R. of the vessel; that they had not sold the vessel so as to deprive R. of her beneficial interest in her nor to destroy her; that the ship's husband might have taken possession before the vessel was libelled; and that R. was not deprived of her interest by any action of the underwriters but by the decree of the court under which she was sold for salvage.

Appeal dismissed with costs.

*McLeod, Q.C.*, for the appellants.

*Weldon, Q.C.*, and *Palmer, Q.C.*, for the respondents.

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#### CROWN CASE RESERVED.

LONDON, July 28, 1894.

REGINA v. SILVERLOOK. (29 L.J.)

*Coram* Lord Russell, C.J., Mathew, J., Day, J., Williams, J., and Kennedy, J.

*Criminal Law—False Pretences—Sufficiency of Indictment—  
Opinion upon Handwriting—Admissibility of Evidence.*

Case stated by the chairman of the Worcestershire Quarter Sessions.

The prisoner was indicted for false pretences. No objection was made to the first count of the indictment. The second count alleged that the prisoner, 'by inserting and causing to be

inserted in a certain newspaper called the *Christian World* a fraudulent advertisement in the words and figures following—that is to say: "Housekeeper wanted for branch business establishment in Midlands. One from country preferred.—Address 'S. C.,' *Christian World* Office"—did falsely pretend to the subjects of Her Majesty the Queen that he, the said George Silverlock, then required a housekeeper for a branch business establishment in the Midlands, by means of which such said last mentioned false pretence the said George Silverlock did then unlawfully obtain from the said Rosa Alice Coates a certain valuable security—to wit, an order for the payment of money, commonly called a banker's cheque, and of the value of five pounds—with intent to defraud.'

Before the prisoner pleaded his counsel applied to have the second count quashed, on the ground that it was not stated that the false pretence was made to any definite person, upon the authority of *Regina v. Sowerby*, 63 Law J. Rep. M. C. 136; L. R. (1894) 2 Q. B. 173. The prosecution contended that in the offence of false pretences by advertisement no specific person could be named, and they relied on *Regina v. Cooper*, 43 Law J. Rep. M. C. 89; L. R. 1 Q. B. 19, and *Regina v. Sargent*, 39 J. P. 760.

The objection was overruled, subject to the opinion of this Court.

The prisoner's counsel further objected that the solicitor for the prosecution was not an expert in handwriting, and could not give evidence as to his opinion upon the prisoner's handwriting, and he relied on the case of *Regina v. Harvey*, 11 Cox, 546.

The objection was overruled on the ground that the objection went to the weight, and not to the admissibility, of the evidence, the solicitor having stated that since 1884 he had given considerable attention and study to handwriting, and that he had on several occasions professionally compared evidence of handwriting.

The jury convicted the prisoner.

The Court held that the second count was good. It sufficiently appeared from the count that it was an advertisement addressed to all to whose knowledge it came, and that a particular person seeing or hearing of the advertisement, acted upon it, and went to the person from whom it proceeded, and on the faith of it parted with money, and it, therefore, became a particular state-

ment. As to the admissibility of the solicitor's evidence, he was skilled, and his opinion upon a question of handwriting could not be excluded because he had not gained that skill in the way of his profession.

Conviction affirmed.

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### THE LONG VACATION.

Is the Long Vacation which has just begun to be the last which lawyers will enjoy? That question, often mooted before, must have been put of late more seriously than it ever was. A few years ago the notion of abridging the Long Vacation would have appeared to most lawyers the mad whim of professional Anarchists. On this point, however, ideas have changed much. More than once at recent provincial meetings of the Incorporated Law Society solicitors have recorded their opinion that the Long Vacation should not remain as it is; and there is no question that, if the junior Bar had to determine the matter, it would say, 'Give us a short vacation in exchange for the long.' Many things have prepared the way for a change. Silently, in virtue of no express rules, but in obedience to an opinion steadily hardening, the Long Vacation has become much less of a reality than it once was. The notice as to vacation business of this year states, as usual, that 'no case will be placed on the judge's list unless leave has previously been obtained, or a certificate of counsel that the case requires to be immediately or promptly heard, and stating concisely the reasons, is left with the papers.' Judges have been known to show, under cover of this provision, much more skill in shunting cases than in deciding them. But of late the tendency has, on the whole, been the reverse; and it is now much more difficult than it was to use the vacation for sinister ends. The offices of the Courts remain open, and business goes on in them at not much slower pace than in other seasons of the year. Writs are issued, judgments signed, *fi. fas.* go forth, and debtors are sold up, in August and September very much as in November and December. The new spirit abroad is expressed in the rules which the President of the Probate Division has sanctioned extending the hours of business at the Probate Registry. Many suggestions as to the future of the Long Vacation are in the air; and one thing is clear as to them. It will not do to say that one or two wheels of the machinery of

justice are to revolve while the others are to stand still. If the Long Vacation is to be abolished or curtailed, it must be so for all purposes and for all functionaries from the highest to the lowest. It would be useless—the public would justly think the last state worse than the first—to take measures for preparing cases for trial during the Long Vacation if no one tried them. A set of new rules which permitted the delivery of pleadings in the Long Vacation—to name one favorite suggestion—would solve nothing and satisfy no one.—*London Times*.

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### THE LAW OF LARCENY.

The Chancellor's bill to amend the law of larceny, which has passed through committee in the House of Lords, is intended to make a small but very necessary change in the law. As between the counties of England larceny has always been held as ambulatory—*i. e.* the thief can be tried in any county through which he has taken the stolen property—but larceny in Scotland or Ireland was not cognisable at common law in England, nor was it an offence to receive in England goods stolen in Scotland or Ireland. This defect was removed as to the United Kingdom by legislation now embodied in section 95 of the Larceny Act, 1861; but as between British possessions or foreign States and the mother country there is no criminal remedy for receiving in the latter goods stolen in the former. This was established as to British possessions by *Regina v. De Breuil*, 11 Cox Cr. Cas. 207, a charge of receiving in England goods stolen in one of the Channel Islands; and as to foreign States by *Regina v. Carr*, 15 Cox Cr. Cas. 131, a charge of receiving property stolen from a mail steamer lying at Rotterdam. The difficulty in the latter instance was ultimately overcome by the leading case of *Regina v. Carr and Wilson*, 52 Law J. Rep. M. C. 12; L. R. 10 Q. B. Div. 76, in which it was established that the larceny was committed within the Admiralty jurisdiction of England. Attention was further drawn to this gap in the law by the case of *Ex parte Otto*, L. R. (1894) 1 Q. B. 420, where a difficulty arose with respect to goods stolen in France, and transferred in England to a man who would probably have been indicted as a receiver had the theft been in England, but who resisted the return of the property to France on the ground of an indefeasible English title. The proposed change of the law is of the most salutary

character, and will, if effected, make England less of an asylum for burglars and bond stealers than it at present is; but it is somewhat of a pity that an Act extending to the whole empire cannot be passed to deal with a number of offences for which colonies cannot legislate so as to destroy the technical defences now available to offenders or their accomplices.—*Law Journal*.

### GENERAL NOTES.

**THE GRAND JURY.**—The *Pall Mall Gazette*, referring to the grand jury system, says:—"The original institution of the grand jury is lost in antiquity. The process of electing it in the time of Richard I. was, according to Blackstone (after Hoveden), as follows: Four knights were to be taken from the county at large, who chose two more out of every hundred, which two associated to themselves ten other principal freemen, and those twelve were to answer concerning all particulars relating to their own district (that is, hundreds or wapentakes). 'It has been shown,' says Mr. Forsyth (in his 'History of Trial by Jury'), 'that these jurors were the representatives of and substitutes for the *fama patriæ* or public rumor by which in all times when a man was assailed he was said to be *male creditus*. . . . For some time there appears to have been no difference between this accusing jury and the trying jury, nor can the exact period be determined when they became separate and distinct. Most probably, however, this happened when the ordeal fell into desuetude and was no longer resorted to as a means of testing the truth of the accusation.' With this account of the origin of the grand jury Sir James Fitzjames Stephen ('History of the Criminal Law,' c. viii.) agrees."

**TRADE-MARKS IN GERMANY.**—In a letter to the *Times*, Mr. Reginald W. Barker says:—"It may interest your readers to know that a new German trade-mark law comes into operation on October 1 next. According to the present law, British marks are registered at Leipsic, but under the new law all previously recorded marks must be entered on the Imperial register at Berlin. The sooner this is done the better, as the first applicant secures priority, and marks previously registered at Leipsic, unless re-registered, will be disregarded by the Berlin officials when dealing with new applications. Owners of trade-marks entered on the Imperial register will be officially informed of

any applications for similar marks for the same goods. Infringers of registered marks will be liable to fine and imprisonment, and also to pay an indemnity to the registered proprietor."

**HOW TO AVOID JURY SERVICE.**—James Payn tells of a friend of his who had avoided jury duty for some time by the assistance of a Government official in acknowledgment of a certain *douceur*, but he got tired of paying an annuity, and wanted it to be done with for good and for all. "For £10," said the official, "I will guarantee that you shall never be troubled again," and the money was paid. When the day came for his attendance at the court, John Jones, let us call him, could not resist the temptation of seeing how his money had been invested. He described the sensation of hearing "John Jones" called out as rather peculiar; it was called out a second time, and he could hardly resist answering to his name; when it was called out a third time, he felt quite upset, and much more so at what took place in consequence. A person in deep mourning, and with a voice broken with emotion, exclaimed, "John Jones is dead, my lord." And his lordship, with a little reflected melancholy in his tone, observed, "Poor fellow; scratch his name out."—*Green Bag*.

**HIS INFORMATION AND BELIEF.**—The following affidavit was filed in the Court of Common Pleas in Dublin in 1822:—"And this deponent further saith, that on arriving at the house of the said defendant, situate in the county of Galway aforesaid, for the purpose of personally serving him with the said writ, he, the said deponent, knocked three several times at the outer, commonly called the hall, door, but could not obtain admittance; whereupon this deponent was proceeding to knock a fourth time, when a man, to this deponent unknown, holding in his hands a musket or blunderbuss, loaded with balls or slugs, as this deponent has since heard and verily believes, appeared at one of the upper windows of the said house, and presenting said musket or blunderbuss at this deponent, threatened 'that if said deponent did not instantly retire, he would send his (the deponent's soul to hell,' which this deponent verily believes he would have done, had not this deponent precipitately escaped."

# THE LEGAL NEWS.

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VOL. XVII.

AUGUST 15th, 1894.

No. 16.

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## *SUPREME COURT OF CANADA.*

May 10, 1894.

New Brunswick]

GRANT v. MAOLABEN.

*Executors and trustees—Probate Court—Passing of accounts—  
Res judicata.*

G. was executor and trustee under a will, and as such passed his accounts yearly in the Probate Court. The accounts so passed contained all the charges and disbursements of G., both as executor and trustee, and the beneficiaries under the will were not represented by counsel on any occasion before the Probate Court. A suit in equity having been brought to remove G. from his position as executor and trustee, the judge in equity, before entering upon the merits, ordered a reference to take the accounts of G., and the reference reported that having taken them, a number of items were disallowed as improper charges. On exceptions to this report the equity judge held that the action of the Probate Court in reference to the accounts was final and not open to review by the court in such suit. On appeal this ruling was reversed by the Supreme Court of New Brunswick, and the referee's report confirmed. On appeal to the Supreme Court of Canada,

*Held*, affirming the decision of the court appealed from, that the Probate Court had no jurisdiction over the accounts of G. as

a trustee, and as it appeared that the items disallowed related to the duties of G. in that capacity, the referee could properly deal with them.

*Held*, further, that the Supreme Court would not reconsider the items dealt with by the referee, as he and the Supreme Court of New Brunswick had exercised a judicial discretion as to the amounts, and no question of principle was involved.

The plaintiffs' bill in the equity suit set out a letter written by G. to one of the plaintiffs, threatening if proceedings were taken against him to make disclosures of malpractice by the testator which might result in heavy penalties being exacted from the estate.

*Held*, that this was such an improper act by G. that the court should have immediately removed him from the trusteeship of the estate.

Appeal dismissed with costs.

*McLeod, Q.C.*, and *Palmer, Q.C.*, for the appellants.

*Hazen*, for the respondents.

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May 1, 1894.

Exchequer Court.]

#### CARTER v. HAMILTON.

##### *Patent of invention—Novelty—Infringement.*

C. & Co. were assignees of a patent for an article called "The Paragon Black Leaf Check Book" used by shopkeepers to prepare duplicate accounts of sales, and the invention claimed was "In a black leaf check book composed of double leaves, one half of which are bound together while the other half folds in as fly leaves, both being perforated across so that they can readily be torn out, the combination of the black leaf bound into the book next the cover and provided with the tape bound across its end, the said black leaf having the transferring composition on one of its sides only." What was alleged to be new in this patent was the device, by means of the tape across the end of the black leaf, by which it could be folded over without soiling the fingers or causing the leaf to curl up.

C. & Co. brought an action against H. for infringing this patent, the alleged infringement consisting of a similar device but with about half an inch of the carbonized leaf free from carbon, the leaf being turned over by means of this margin instead of the tape.

*Held*, affirming the decision of the Exchequer Court of Canada (3 Ex. C. R. 351) that the evidence at the trial showed the device for turning over the black leaf without soiling the fingers to have been used before the patent of C. & Co. was issued; that the tape across the end of the black leaf was the only novel element in the patented article, and that the device used by H. was not an infringement of the patent depending on the tape to render it patentable.

Appeal dismissed with costs.

*W. Cassels, Q.C.*, and *Edgar*, for the appellants.

*Johnston, Q.C.*, and *Heighington*, for the respondents.

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May 1, 1894.

New Brunswick.]

ST. JOHN GAS LIGHT CO. v. HATFIELD.

*Master and servant—Common employment—Negligence—Questions of fact—Finding of jury.*

The St. John Gas Light Co., being engaged in laying a main through one of the public streets of the city, applied to one Wisdom, a plumber and gas-fitter, for the services of a competent man, and H. was sent by Wisdom to work on said main. While H. was working at one end of a pipe he was injured by gas escaping therefrom being set on fire from a salamander used in carrying on the work, and exploding. One of the servants of the Company, whose duty it was to turn on the gas at this pipe every evening and turn it off every morning, had neglected to turn it off the morning the accident happened, and there was evidence that the salamander had been moved from its usual place and put near the end of the pipe where H. was working by order of the manager of the Company.

In an action by H. for damages from such injury, the jury found that the Company was guilty of negligence, and that H. at

the time of the injury was not in the service of the Company, but in that of Wisdom. A verdict in favor of H. was sustained by the full court.

*Held*, affirming the decision of the Supreme Court of New Brunswick, that the finding as to negligence was warranted by the evidence.

*Held*, further, that whether or not there was a common employment between H. and the servants of the Company, was a question of fact, and the jury having found that H. was not in the service of the Company, their finding would not be interfered with on appeal.

Appeal dismissed with costs.

*Hazen*, for the appellants.

*Currey*, for the respondent.

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## HOUSE OF LORDS.

LONDON, July 31, 1894.

THORSTEN NORDENFELT v. THE MAXIM-NORDENFELT GUNS AND  
AMMUNITION COMPANY (29 L.J.).

*Restraint of Trade—Covenant—Reasonableness—Public Policy—  
Validity.*

A covenant entered into by the appellant with the respondents not to engage for the term of twenty-five years—except on behalf of the respondents—directly or indirectly, “in the trade or business of a manufacturer of guns, gun mountings or carriages, gunpowder or explosives or ammunition, or in any business competing, or liable to compete, in any way” with the business of the company, held in the circumstances not to be unreasonable, or to exceed what was necessary for the protection of the covenantees.

Their Lordships (Lord Herschell, L.C., Lord Watson, Lord Ashbourne, Lord Macnaghten, and Lord Morris) affirmed the decision of the Court of Appeal (62 Law J. Rep. Chanc. 273).

## COURT OF APPEAL.

LONDON, July 2, 1894.

REISCHER V. BORWICK (29 L.J.).

*Insurance—Marine—Construction—‘Damage received in collision’—  
Proximate cause.*

Appeal from a decision of Kennedy, J.

The action was brought by the owner of the steamship *Rosa* upon a marine policy which insured only against the risk of collision and damage received in collision with any object. During the currency of the policy the *Rosa*, while engaged on a trip in the Danube, struck against a floating snag which fouled the port paddle-wheel and damaged the vessel. The damage was mainly to the engine-room machinery, and included the breaking of the cover of the condenser, which left an opening of twenty inches square. In consequence of the damage the ship began to leak. The captain plugged the ejection-pipes on either side of the ship to prevent the water coming through the pipes into the condenser and so into the vessel, and he also sent for a tug to the nearest port. A tug duly arrived and took the *Rosa* in tow, after she had been made as secure as possible. While she was being towed to a place of repair the plug in the ejection-pipe on the port side came out; this caused a sudden inrush of water, and in order to prevent the vessel from sinking the captain ordered the tug to tow her on to the shore and beach her.

Kennedy, J., held that the defendants, the underwriters, were liable not only for the damage which accrued before the time when the ship was taken in tow, but also for the subsequent damage.

The underwriters appealed from the latter part of this judgment. They contended that the proximate cause of such damage was not the collision, but the towing to a place of repair.

Their Lordships (Lindley, Lopes, Davey, L.JJ.) dismissed the appeal. In their opinion the sinking of the ship was proximately caused by the internal injuries produced by the collision and by water getting through the injured parts whilst she was being towed to a place of repair. That being so, the plaintiff was entitled, in the absence of any negligence on the part of those on board, to recover. This view was not inconsistent with *Pink v. Fleming*, 59 Law J. Rep. Q. B. 599; L. R. 25 Q. B. Div. 396.

## CHANCERY DIVISION.

LONDON, June 29, 1894.

NATIONAL DWELLINGS SOCIETY v. SYKES (29 L. J.)

*Company—Shareholders' meeting—Conduct of business—Duties of chairman.*

At an ordinary general meeting of a company a resolution was moved that the reports and accounts be received, and a motion was made substituting in lieu thereof another resolution for the appointment of a shareholders' committee of investigation. The original resolution was put and lost. The chairman then declared such resolution to be lost, and said that he dissolved the meeting. He then vacated the chair and left the room, being accompanied by a few shareholders. The shareholders in the room unanimously elected another chairman and proceeded to pass resolutions. When the chairman purported to dissolve the meeting part of the ordinary business of the meeting had not been disposed of or even mentioned.

Chitty, J., said that it was not within the scope of the chairman's power to stop the meeting at his own will and pleasure, and that the meeting could by itself resolve to go on with the business for which it was convened, and appoint another chairman to conduct the business.

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*THE PROCLAMATION OF NEUTRALITY.*

The proclamation of neutrality—published in the *Gazette* of the 7th instant—brings into active operation those provisions of the Foreign Enlistment Act which define the duties of British subjects in a war between two Powers, both of whom are on terms of peace with the British Crown. The recent seizure under warrant of the Secretary of State of ships being constructed or equipped for the Chinese Government is a sufficient proof that the British Government are determined to enforce strict neutrality. There can be no doubt as to the wisdom of this course.

The proclamation recites the provisions of the statute bearing on illegal enlistment. An offence under the Act is committed by any British subject who accepts, or agrees to accept, any

commission for military or naval service from either belligerent, or by any person, British or foreign, who endeavors to induce a British subject to accept such commission. A like offence is committed by any subject who goes on board any ship, or attempts to induce a British subject to go on board a ship, with like intent. Furthermore, anyone who by false representations of the nature of the proposed service induces any subject to board any ship or quit the realm, with the intent that afterwards such subject may take service under a belligerent, is likewise guilty of an offence punishable by fine and imprisonment.

The master or owner of a ship in any way aiding in such illegal enlistment is also liable, and may be similarly punished. The ship is to be detained until security for the payment of penalties shall have been given. In every case all illegally enlisted persons shall, immediately on the discovery of the offence, be taken on shore, and shall not be allowed to return to the ship.

With reference to illegal shipbuilding, it is provided that any person who builds, agrees to build, commissions, equips or dispatches any ship, having reasonable cause to believe that the same is to be employed in the naval or military service of a belligerent, is guilty of an offence. The penalty is, however, more drastic than in case of illegal enlistment. In case of illegal shipbuilding, the ship is forfeited to the Crown.

If, however, the ship is being built in pursuance of a contract made before the commencement of the war, then, if certain conditions be fulfilled, no offence is committed. These conditions are: (1) Notice must be given to the Secretary of State; (2) security must be given that the ship shall not be dispatched before the termination of the war. It is noticeable that in all these provisions as to illegal shipbuilding the burden of proof is reversed. The burden lies on the builder to prove that he did not know that the ship was intended for warlike purposes.

Augmenting the warlike force of any ship of a belligerent is likewise an offence under the Act, similarly punishable. This may be done in any way; for instance, by adding to the number of the guns, by changing those on board for other guns, or by the addition of any equipment of war.

The last offence dealt with by the Act relates to the preparing of any naval or military expedition to proceed against the dominion of any friendly State. Any person so engaged is punish-

able by fine and imprisonment, and all ships and their equipments, all arms and muniments of war, are forfeited to the Crown.

A sweeping provision is, that any person who counsels the commission of an offence under the Act is liable to be tried as a principal offender.

The Act provides, further, that if a Secretary of State is satisfied that there is reasonable cause for believing that a ship is being built or equipped contrary to the Act, he may issue a warrant for the seizure and detention of such ship. This is the provision under which the late seizure was made.

In addition to calling public attention to the provisions of the Act, the proclamation also in usual form warns all subjects of the penalties demanded by the Law of Nations against persons who violate the duties of neutrality, more especially by breaking blockade, or carrying despatches or soldiers or contraband of war. Such persons are liable to hostile capture, and to the penalties demanded by the Law of Nations.—*Law Journal*.

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### THE FOREIGN ENLISTMENT ACT.

The proclamation of neutrality published a fortnight ago has been followed by the arrest of two vessels supposed to be intended as war vessels for the Chinese or Japanese Governments. Only one prosecution has, we believe, taken place under the Foreign Enlistment Act, 1870 (33 & 34 Vict. c. 90)—*Regina v. Sandoval*—a case which arose out of some operations by persons interested in fomenting a Venezuelan revolution. That case is of legal interest as deciding (1) that civil war abroad is included within the scope of the Act; (2) that an expedition is illegal within the Act although munitions of war are not shipped in British waters, if the preparation of the vessel in England is clearly part of an intended enterprise of a warlike character. And it is well that the existence and efficacy of the statute should be demonstrated to enterprising English manufacturers and shipbuilders. The action of the Government has, of course, led to some indignation among the shipowners concerned in importing rice and coal into China or in selling merchant vessels, and to some doubt as to the limits of executive power in such cases. This indignation is not lessened by the telegrams

that the United States, whose sufferings from the *Alabama* led to the Act, has apparently done nothing to stop the manufacture and sale of munitions of war both to China and Japan. A further question will probably arise—namely, whether Chinese or Japanese public vessels commissioned but not completed, and in British ports at the outbreak of the war, can be stopped. It is stated, but we cannot say with what truth, that the *Alaska*, lying in the Thames, is a Chinese war vessel and is being completed. If this is so, section 10 of the Act of 1870 appears to apply, which prohibits the augmentation of the warlike force of a ship in the military or naval service of a foreign State at war with a State with which Her Majesty is at peace. That section, however, does not purport to touch the *personnel* on the foreign ship or her hull, but imposes penalties on British subjects who aid in the augmentation.—*Ib.*

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#### ORIENTAL BELLIGERENTS AND EUROPEAN TRADE.

For the first time since the foundation, in 1650, of the modern European Law of Nations is it proposed to subject British and European commerce to the control of the ships of an Oriental belligerent. This most dangerous precedent should not be allowed to pass without protest. It is a step certain to be regretted before long, and one which is not likely to found a custom. It is the worst of all the results arising from careless ascription to Oriental potentates like the Mikado and the ruler of China of those attributes of 'sovereignty, equality, and independence' which international law postulates for the rulers of States of the European race.

European States steadily refuse to subject Europeans to Oriental 'Courts of justice,' notwithstanding the persistent warfare on the consular jurisdiction waged by Japanese and Chinese diplomatists. Similarly will it be seen before long that nothing but disaster is to be expected from subjecting British and other European sailors and travellers to a visit, search, and capture on the high seas by Japanese and Chinese officials. Bloodshed is certain to follow—British sailors do not err on the side of meekness, and Oriental ideas of exercising power are not distinguished

by humanity. To this must be added the serious loss of millions sterling represented by the interference with European trade.

If practical illustration be wanted of the absurdity of such a policy, the sinking of the *Kow Sing* is sufficient. The British flag has been fired on by a ship of war, although full knowledge had been acquired of the real nationality of the vessel fired upon, its papers having been inspected by the Japanese aggressors. Firing on drowning soldiers is a sufficient proof of the manner in which any acknowledged war rights over Europeans are likely to be exercised.

The British declaration of neutrality, which also warns British subjects against any infringement of the Foreign Enlistment Act, has been furnished to the Tartar Government of China, and extensively circulated. Neutrality, in one sense of the word, is certainly advisable; in the absence of joint European intervention, the two Oriental combatants may well be let fight out their quarrel without the active participation of European citizens on either side. But there is no necessity why that declaration of neutrality should be allowed to entail on British and European commerce that subjection to Japanese and Chinese inspection and capture which is apparently contemplated by some writers as regular and inevitable. State war rights under international law are confined to States of the European race; among those States alone is to be found that community of beliefs and customs—the outcome of common race, religion and history—which alone justifies the subjection of citizens of one State to the authority of another.

It is satisfactory to note that notwithstanding this theoretical ascription of war rights to the Oriental combatants, the necessity of not letting the absurdity go too far is already perceived by the British Foreign Office. The Under-Secretary for Foreign Affairs has announced in the House of Commons that the Japanese Government have promised that no warlike operations will be undertaken against Shanghai, and upon this condition the Chinese Government will not obstruct the approaches of Shanghai.—*Ib.*

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#### THE LATE DAVID DUDLEY FIELD.

The death of this great lawyer and jurist took his family and the world by surprise, although he had passed his eighty-ninth year. He had just returned from a visit in England to his

daughter, Lady Musgrave, and a sojourn in Italy, and was apparently full of vigor and his usual high spirits. But a serious attack of the grip two years ago had insidiously sapped his strength, and he fell a victim to pneumonia in a few hours. Except for a slight stoop and a little deafness, and the failing of sight ordinary in persons of his years, Mr. Field seemed in perfect health and strength, and not unlikely to achieve his often declared purpose of living to the age of a hundred years.

In Mr. Field has passed away the most conspicuous legal figure of the world for the last half century. Undoubtedly he was the best known and most widely celebrated lawyer of that period, at home and abroad. His labors in domestic law reform had made his name the most familiar and his reputation the most commanding in this country, and his achievements in international law and law reform had given him an extensive influence in England, on the continent of Europe, and indeed in almost every part of the world where law is prevalent and respected and where there is any desire to make laws better.

Mr. Field was in a great legal practice and had a commanding influence in our courts until he retired, less than ten years ago. In his later years he took only such cases as he desired, and was in constant request as a counsellor where vast financial interests were involved, either of an individual or a corporate character. It is understood that he had accumulated a large fortune in the active practice of his profession and by judicious ventures and investments. He had an extremely practical mind, and was a very sagacious man of business, not only as an adviser but in his own affairs—a combination not very often occurring, for lawyers are quite generally, we believe, rather inferior in judgment in their own business matters. Mr. Field, by habit, induced by the necessities of his early years, practised the New England thrift in small things, while in larger affairs he did not scruple to spend money liberally. He was aware that he had the reputation of being parsimonious and grasping, and several years ago he confided to us a fact which he would not have allowed to be heralded in his life, but which his death allows us to divulge: when Chief-Justice Taney died in penury, and leaving a daughter without means of support, there was a proposal among the national bar to make some provision for her, but it moved so sluggishly and seemed so likely to fail, that Mr. Field voluntarily came forward and gave his personal bond to the

clerk of the Supreme Court of the United States, conditioned to pay the daughter an annuity of five hundred dollars. This covenant he kept for eighteen years. It must be borne in mind that Mr. Field knew neither the Chief Justice nor the daughter at all, and that he did not at all approve of the Chief Justice's political sentiments, but what he did was for the honor of the Bar and to save the nation from discredit. The act was like him, and the omission to proclaim it was also like him. But he would not submit to imposition because he was a rich man. So when a pair of his old shoes was lost at the Delavan House in Albany, when he was a guest there—they were stolen from his door by some drunken assemblymen, for a lark—he made the landlord send out and buy him a new pair of four dollar shoes. The landlord subsequently found the missing shoes and sent them to him with a sarcastic note, and Mr. Field returned the new shoes, observing that he liked the old ones a great deal better. His stalwart and noble figure, clad in that old gray suit, with that time-honored blue or red necktie—the one gaiety he indulged in dress—and in those old shoes, was one that commanded respect, and there were few indeed, fit to stand in those shoes.

Mr. Field had a perfectly adequate estimate of his own powers and the value of the exercise of them, and he was not at all modest in his charges. He believed thoroughly in giving the very best of his talents to his clients and then charging them what he thought they were worth.

On one occasion, as he told us, he was employed by a great corporation to write an opinion on a matter of vital moment to its interests. He bestowed several days on it and charged, as we recollect, five thousand dollars for it. The corporation officers were astounded by the amount. Mr. Field said: "Why did you come to me? You knew that I am not a cheap lawyer. You knew that you could get an opinion to the same effect for a fifth of the money from any one of half a dozen lawyers"—naming them—"which would have commanded respect, but for some reason you came to me. Now I think you came to me because you believed that my opinion would be more influential in effecting the result which you desired, and I believe that end has been accomplished, and that my opinion contributed largely toward it. A'm I not right?" The officers could not gainsay these allegations. "Very well, then, gentlemen, you have be-

nefted to a vast amount through my opinion, and you must pay me my charge, which, all things considered, is a very small one." They paid, and they kept on paying his charges.

Among Mr. Field's most striking personal peculiarities was his violent hatred of tobacco. He could not endure tobacco smoke, and he was shut out from many public occasions by his sensitiveness in regard to it. It was very amusing to smokers to hear him rail against smoking, and especially his comments on the slavery of mankind to a habit which compelled public carriers to furnish separate vehicles for their indulgence in it—"worse than cattle cars," he used to call them. One of his best written papers is a diatribe against tobacco.

This leads us to speak of his rhetorical style, which is remarkable for its beauty and simplicity, its originality, vigor, and absolute clearness—an absolutely flawless style, peculiar to the man, and as characteristic as that of Lincoln or of Grant. His written style, considering the intense earnestness of his nature, the strength, not to say violence of his convictions, and the antagonisms which he aroused, and gloried in arousing, was noticeable for its moderation and large minded candor.—*Mr. J. Browne in the Green Bag.*

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#### *RIGHT OF A SOLICITOR TO RETIRE FROM A CASE.*

Of late several cases of importance to solicitors have been decided by the Court of Appeal, but probably the most interesting was that in which it was held that the right of a solicitor to sue for his costs is lost, if in a common law action he throws up the case without reasonable cause. On the one hand it may be said that, the client having the right to change solicitors, there should be a correlative right on the part of the solicitor to leave his client, of course on reasonable notice; on the other hand, it would seem a hardship on the client if, having instructed a skilled person in the facts of the case, he could be driven to give his instructions over again to another, perhaps being obliged to do this three or four times during the course of the action. The simple point for determination is the exact contract entered into by a solicitor with his client.

It seems strange that such a matter should have been left to be argued before a modern Court. In fact, the point seems to have been decided beyond all reasonable doubt in the early part of the

century. For instance, in *Cresswell v. Byron*, 14 Ves. 271, Lord Eldon is reported to have said, 'The Court of Common Pleas, when I was there, held that an attorney, having quitted his client before trial, could not bring an action for his bill.' Some later authorities seem to point the other way, though the attempt to found an argument upon them was never really successful; such cases are *Harris v. Osborne*, 3 Law J. Rep. Exch. 182; 2 C. & M. 629; *Vansandau v. Browne*, 2 Law J. Rep. C. P. 34; 9 Bing. 402. In the first of these it was settled only that the contract between attorney and client was to carry on the suit to its termination, determinable by the attorney on reasonable notice only; this somewhat differs from the proposition that, provided he give reasonable notice, he may abandon the client without reasonable ground. So far the law seems to have been clear, but the late Master of the Rolls, in the case of *In re Hall and Barker*, 47 Law J. Rep. Chanc. 621; L. R. 9 Chanc. Div. 538, did something to unsettle the law, and to make it possible to suggest that the former rule no longer held good. The headnote to that case is as follows: 'The old rule of common law that the retainer of a solicitor for a particular business is a retainer for the purpose of carrying through that business to a conclusion, and that until that conclusion he has no right of action against his client, is founded on the principle of entirety of contract, and is not to be extended to the case where a solicitor undertakes a business of a complicated nature—*e.g.* the administration of an estate; in such case the solicitor's bill of costs for carrying such business through is not necessarily to be treated as one bill.' But it is the terms of the judgment which throw doubt upon the correctness of the old decision as applied to modern litigation.

A case of considerable importance in this connection came before the tribunals last year—*viz.* *In re Romer and Haslam*, 62 Law J. Rep. Q. B. 610; L. R. (1893) 2 Q. B. 286. The exact point now being dealt with was not raised, but in the course of his judgment Lord Esher said: 'If a solicitor undertakes to carry through a particular legal transaction, the law says he cannot send in to his client a final bill until the transaction is completed. I take it that that principle of law has been acted upon, and is the same in Courts both of law and equity; but in the Courts of equity, where the transaction was such that it could be divided into several stages, the Court treated certain stages in the suit as completed, although the whole suit had

not been carried to a conclusion.' And Lord Justice Bowen, after enunciating, with approval, the old common law rule, said that *In re Hall and Barker* showed that it would not apply to all equity matters. Lord Justice Kay said: 'If the matter in respect of which the solicitor is retained be a simple matter, then, *prima facie*, the contract with the solicitor is an entire contract, and he is not entitled to send in his bill of costs to his client and insist upon payment until that matter has been concluded; but where the matter is of a complicated character, and involves, for instance, considerable outlay, then it is very difficult to apply a principle of that sort to matters on either the Chancery or common law side, or in arbitration, or in bankruptcy, or winding-up proceedings, where it may be unreasonable to say that the solicitor is to have no remedy for his costs, or to any part of them, until the matter in question has been concluded.' And the question remained in this state until May of the present year, when *Underwood, Son & Piper v. Lewis*, L. R. (1894) 2 Q. B. 306, came up to the Court of Appeal. It was then decided that the old cases were still correct, so far, at any rate, as they relate to actions of a common law character. The contract of a solicitor who accepts a retainer in a common law action was declared to be an entire contract to conduct the case of the client until the completion of the action; and it was also held that he is not entitled, without good cause, to decline to act further in the action for him, and thereupon to sue for costs in respect of previous conduct of the client's case. Good cause is a matter for determination in each case, but refusal of a client to supply funds requisite for the carrying on of the action is good cause. 'A solicitor,' said Lord Esher, 'cannot reasonably be expected to disburse out of his own pocket money which he may be unable to get back from his client or the other side, or which, at any rate, he may be kept out of for a long time.' But even if there be good cause for retiring, the solicitor must give the client a reasonable notice before he withdraws from the action. The result is that *In re Hall and Barker*, so far as it throws any doubt on this proposition, is overruled; though its application to a certain class of Chancery proceeding is by no means interfered with.—*Law Journal*, (London.)

## GENERAL NOTES.

**THE RIGHT TO PETITION PARLIAMENT.**—The question of the right to petition Parliament was raised in the Westminster County Court before his Honor Judge Lumley Smith, Q.C. Mr. Alexander Chaffers sought to obtain £1 as nominal damages from the Speaker of the House of Commons. The plaintiff deposed that on several occasions he had sent a petition to the Speaker. On each occasion the latter refused to present it. His Honor, without hearing the defendant, said the matter raised was of importance, but he was bound by the decisions of the High Court, which had decided that an individual member of Parliament who refused to present a petition was not liable to have an action brought against him. If the Speaker was bound to present all petitions it must place him in a peculiar position in the event of one being received by him impeaching his own conduct. Judgment for the defendant.

**BRIBING A JURY.**—It is seldom that we hear of direct attempts to bribe jurymen, either in this country or abroad. This seems to have been tried during the recent trial in Rome of the directors of the Banco Romano. During the trial one of the jury, it was said in several daily papers, received a letter with a bank-note for 1,000 lire wrapped in a piece of paper on which was written the single word "Acquit." Another received a letter and note for 500 lire with the instruction "Condemn." Both letters were brought under the notice of the judge, and as the writers could not be traced, it was decided to give the money to a charitable institution in the capital. The old proverb of an ill-wind, etc., surely holds good here.—*Law Journal*.

"WHAT'S IN A NAME?" says the *Green Bag*, and quotes a Kentucky newspaper as follows: "Benjamin Franklin was lately whipped for stealing chickens; Thomas Jefferson sent up for vagrancy; James Madison fined for getting drunk; Aaron Burr had his eye gouged out in a fight; Zachary Taylor robbed a widow of her spoons; John Wesley was caught breaking into a store; George Washington is on trial for attempted outrage; Andrew Jackson was shot in a negro bar-room; Martin Luther hung himself on the garden palings while stealing a basket of vegetables, and Napoleon Bonaparte is breaking rock for a three-dollar fine in New Orleans.

# THE LEGAL NEWS.

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VOL. XVII.

SEPTEMBER 1, 1894.

No. 17.

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SUPREME COURT OF CANADA.

OTTAWA, May 1, 1894.

BAXTER V. PHILLIPS.

Quebec.]

*Rights of succession—Sale by co-heir—Sale by curator before partition—"Retrait successoral"—Art. 710 C. C.—Prescription.*

When a co-heir has assigned his share in a succession before partition, any other co-heir may claim such share upon reimbursing the purchaser thereof the price of such assignment, and such claim is imprescriptible so long as the partition has not taken place.—Art. 710 C. C.

A sale by a curator of the assets of an insolvent, even though authorized by a judge, which includes an undivided share of a succession of which there has been no partition, does not deprive the other co-heirs of their right to exercise by direct action against the purchaser thereof the *retrait successoral* of such undivided hereditary rights.

The heir exercising the *retrait successoral* is only bound to reimburse the price paid by the original purchaser, and is not bound in his action to tender the moneys paid by the purchaser.

Appeal dismissed with costs.

*Blüque, Q.C.*, for the appellant.

*Driscoll and D. C. Bowie*, for the respondent.

31st May 1894.

Quebec.]

## CHAMBERLAND V. FORTIER.

*Action "negatoria servitutis"—Right of passage—Private road—Government moneys in aid of—R. S. P. Q. Arts. 1716, 1717 and 1718—Arts. 407 and 1589 C. C.*

The plaintiff, proprietor of a piece of land in the parish of Charlesbourg, claimed to have himself declared proprietor of a heritage purged from a servitude, being a right of passage alleged to be claimed by his neighbor the defendant. The road was partly built with the aid of Government municipal moneys, but no indemnity was ever paid to the plaintiff, and the privilege of passing on said private road was granted by notarial agreement by the plaintiff to certain parties other than the defendant.

*Held*, reversing the judgment of the Court of Queen's Bench for Lower Canada (Appeal side), that the mere granting and spending of a sum of money by the Government and the municipality did not make such private road a colonization road within the meaning of Art. 1718 R. S. P. Q.

Appeal allowed with costs.

*Amyot, Q.C.*, for appellant.

*Languedoc, Q.C.*, for respondent.

1st May, 1894.

Quebec.]

## BELL'S ASBESTOS CO. V. JOHNSON'S CO.

*Action en bornage—R. S. Q. Arts. 4153, 4154—Straight line.*

Where there is a dispute as to the boundary line between two lots granted by patents from the Crown, and it has been found impossible to identify the original line, but two certain points have been recorded in the Crown Lands Department, the proper course is to run a straight line between the two certain points.—R. S. Q. Art. 4155.

Appeal dismissed with costs.

*Stuart, Q.C.*, and *A. Hurd*, for appellants.

*Irvine, Q.C.*, and *J. Lavergne*, for respondents.

31st May, 1894.

Quebec.]

GUYON DIT LEMOINE V. CITY OF MONTREAL.

ALLAN V. CITY OF MONTREAL.

*Expropriation—35 Vic. ch. 32, sec. 7, P. Q.—Interference with award of arbitrators.*

In matters of expropriation where the decision originally of a majority of arbitrators who were men of more than ordinary business has been given, such decision should not be interfered with on appeal upon a question which is merely one of value. (Judgment of Court of Queen's Bench, Montreal, R. J. Q., 3 B. R. 181, affirmed).

Appeal dismissed with costs.

Robertson, Q.C., and Geoffrion, Q.C., for appellants.

Ethier, Q.C., and Greenshields, Q.C., for respondents.

31st May, 1894.

Ontario.]

TOWN OF WALKERTON V. ERDMAN.

*Evidence—Action for personal injuries caused by negligence—Examination of plaintiff de bene esse—Death of plaintiff—Action by widow under Lord Campbell's Act—Admissibility of evidence taken in first action—Rights of third party.*

Though the cause of action given by Lord Campbell's Act, for the benefit of the widow and children of a person whose death results from injuries received through negligence, is different from that which the deceased had in his lifetime, yet the material issues are substantially the same in both actions and the widow and children claim, in effect, under the deceased; therefore where an action is commenced by a person so injured in which his evidence is taken *de bene esse*, and the defendant has a right to cross examine, such evidence is admissible in a subsequent action taken after his death under the Act. Taschereau and Gwynne, JJ., dissenting.

The admissibility of such evidence as against the original defendants is not affected by the fact that said defendants, a municipal corporation, sued for injuries caused by falling into an excavation in a public street, have caused a third party to be added

as defendant as the person who was really responsible for such excavation, and that such third party was not notified of the examination of the plaintiff in the first action and had no opportunity to cross-examine him. Taschereau and Gwynne, JJ., dissenting.

*Aylesworth, Q.C.*, for the appellants.

*Shaw, Q.C.*, for the respondent.

*O'Connor, Q.C.*, for third party.

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31st May, 1894.

Ontario.]

GRAND TRUNK RY. CO. v. WEEGAR.

*Railway Company—Injury to employee—Negligence—Finding of jury—Interference with, on appeal.*

W. was an employee of the G. T. R. Co., whose duty it was to couple cars in the Toronto yard of the Company. In performing this duty on one occasion under specific directions from the conductor of an engine attached to one of the cars being coupled, his hand was crushed owing to the engine backing down and bringing the cars together before the coupling was made. On the trial of an action for damages, resulting from such injury, the conductor denied having given directions for the coupling, and it was contended that W. improperly put his hand between the draw bars to lift out the coupling pin. It was also contended that the conductor had no authority to give directions as to the mode of doing the work. The jury found against both contentions, and W. obtained a verdict which was affirmed by the Divisional Court and Court of Appeal.

*Held*, per Fournier, Taschereau and Sedgewick, JJ., that though the findings of the jury were not satisfactory upon the evidence, a second court of appeal could not interfere with them.

*Held*, per King, J., that the finding that specific directions were given must be accepted as conclusive; that the mode in which the coupling was done was not an improper one as W. had a right to rely on the engine not being moved until the coupling was made, and could properly perform the work in the most expeditious way which it was shown he did; that the conductor was empowered to give directions as to the mode of doing the

work if, as was stated at the trial, he believed that using such a mode would save time; and that W. was injured by conforming to an order to go to a dangerous place, the person giving the order being guilty of negligence.

*McCarthy, Q.C.*, for appellants.

*Smyth*, for respondent.

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### CHANCERY DIVISION.

LONDON, June 28, 1894.

*In re* THE BREWERY ASSETS CORPORATION. *Ex parte* TRUMAN  
(29 L.J.).

*Company—Winding up—Contributory—Application for shares—  
Withdrawal of—Verbal statement to clerk of company—Stop-  
page of cheque for instalment.*

T., on November 4, 1890, filled in a form of application for ten shares in the company, and handed it to a clerk of the company at the company's office, together with a cheque for the amount of the instalments payable on the shares upon application and allotment. Later in the day he called again at the company's office and informed a clerk of the company that he withdrew his application for shares, and demanded back his cheque. The clerk told him that he could not give him back his cheque as the secretary was out. T. called again later, but found the office closed. The next morning he instructed his bankers to stop payment of his cheque, and that they did. On November 7 the directors allotted the shares to T. He received the letter of allotment on November 8, but he returned it at once. The fact that the cheque had not been paid appeared from an entry in the company's bank pass-book under date Nov. 5, and also from entries in the books of the company, but it did not appear that the directors were aware of it at the date of the allotment. The company never took any proceedings to enforce payment by T. of the money due on the application for or allotment of the shares, or the first call made in January, 1891. Resolutions for a voluntary liquidation were passed by the company in November, 1892, and the liquidator put T. on the list of contributories. He took out a summons for the removal of his name.

Wright, J., said that he ought to draw the inference, in the absence of evidence to the contrary, that the clerk to whom T.

made his statement was so far in charge of the premises that it must be imputed to the company that the statement was made to him as a person who, in the absence of others, had authority to receive it, and T.'s withdrawal of his application must be taken to have been communicated to the company. Further, that directors who are making allotments of shares based upon payments to their bankers, ought to make inquiry as to the payments. The stoppage of T.'s cheque was on record, and if the directors in the present case had ascertained that they would have been put upon their guard. The allotment to T. had been made without authority, and he was entitled to the relief he asked for.

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*LORD RUSSELL ON THE LATE CHIEF JUSTICE  
COLERIDGE.*

As the late Chief Justice Coleridge has fared somewhat hardly at the hands of his biographers, it is but fair that so competent a critic as his successor, Lord Russell of Killowen, should say what he knows. This he has done in an article contributed to the *North American Review*.

Speaking of the celebrated "silver" tongue, Lord Russell says: "If I except the voices of, perhaps, Sir Alexander Cockburn, Mr. Gladstone, the present Sir Robert Peel, and the late Father Burke, of the Dominican Order, I shall have exhausted the list of those who may be said to have been his superiors in this respect."

His power of advocacy are thus referred to: "Mr. Coleridge possessed the gift of lucid exposition, and had higher qualities as an advocate than Mr. Karslake. He commanded a more beautiful diction, a finer voice, and he was endowed with a power of imagination and of pathos in which his rival was deficient. It used to be said of Mr. Coleridge that he was worst in a losing and best in a winning case, when a blaze of fireworks was wanted. I think this does not do him justice. I have known him fight difficult cases strenuously, and winning cases modestly. He was taken all in all, a remarkable advocate. No doubt the case with which his name will be principally linked is the *Tichborne Case*. His cross-examination of the Claimant was at the time the subject of widely divergent opinions at the Bar. For my own part, I thought it, and still think it, the best thing he ever did. It was not a cross-examination calculated, nor should I think even

intended, for immediate effect. It was not like the brilliant cross-examination of the witness Baignet by Mr. Hawkins (now Mr. Justice Hawkins), in which the observer could follow the point and object question by question; but it was one the full force and effect of which could only be appreciated when the facts, as they ultimately appeared in the defendant's case, were finally disclosed. When, indeed, the subsequent prosecution for perjury took place, it was then seen how thorough and searching that cross-examination had been; how in effect, if I may use a fox-hunting metaphor, all the earths had been effectually stopped. I am glad to find that my opinion of that cross-examination has recently been corroborated by so eminent an authority as the Master of the Rolls, Lord Esher. I must not be understood in what I have said to depreciate his great speech in the *Tichborne Case*. A more masterly exposition of complicated facts combined with a searching criticism of the Claimant's evidence has rarely, if ever, been delivered."

The judicial powers of Lord Coleridge are thus described by Lord Russell: "He is undoubtedly entitled to be described as a strong judge; and when the case was sufficiently important to prompt him to take pains, his judgments showed a broad, masterful grasp of the principles of the law he elucidated. I do not think he possessed the great synthetical and analytical powers of Sir Alexander Cockburn at his best, nor the vigorous common-sense of Sir William Erle, nor the wide, legal erudition of the late Mr. Justice Willes, nor the intimate knowledge of the various branches of commercial law of the late Lord Bramwell, nor the hard-headed logic of Lord Blackburn (I do not refer to eminent judges still on the bench); nevertheless he cannot be said to have lacked any quality essential in a great judge. Some of his judgments may well take rank with the best of his time, and many of them are marked by an elegance of diction and possess a literary merit not often met with in judicial records. His judgments in the litigation of the Duke of Norfolk in relation to the Fitzalan Chapel, in the case (commonly known as the *Mignonette Case*) of the seamen Dudley and Stephen (charged with murder in having, under stress of hunger, killed and eaten a boy, one of their crew), and in the remarkable commercial case known as the *Mogul Boycotting Case*, may be referred to as good examples. His direction to the jury on the trial for blasphemy of Ramsey

and Foote, in 1883, is regarded as a departure from the law upon that subject as previously laid down by eminent men—a departure, be it added, which has, I think, received the sanction of the profession generally, and a departure in consonance with the freer and more tolerant spirit of the time.”

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*FIRING ON A NEUTRAL BEFORE DECLARATION  
OF WAR.*

The recent report, now confirmed, that the transport conveying Chinese troops to Corea, which was sunk by a Japanese war-ship, was at the time it was fired upon flying the British flag, must raise a serious question of international law. No declaration of war had been sent by the Japanese to the Chinese Government; no manifesto to neutrals had been issued by the Mikado.

Assuming for the moment that the maximum right of British and other European citizens in this war in the Far East is to be measured by the ordinary laws of war obtaining among European States, it is quite plain that a valid claim for compensation can be put forward by the British owners of the transport *Kow Shing*. Since 1750, formal declarations of war addressed to the hostile powers have been discontinued as a regular practice; although the Franco-Prussian War of 1870 was preceded by a notice by the French to the Prussian Government, and the Russo-Turkish war of 1877 was preceded by a like notice from Russia. But it is positively established as a right of neutral powers to be apprised by means of a manifesto from the State commencing war. The reason for the practice is obvious. The existence of an acknowledged state of war confers upon belligerents rights of seizure of contraband and of declaring blockade—rights which directly affect neutral commerce, and which impose obligations of neutrality on States taking no part in the war. As between the belligerents themselves, war begins either on direct notice from one to the other, or on the first act of hostility; but as, between belligerents and neutrals, war, with its attendant rights of capture and attendant duties of neutrality, does not begin until notice through a manifesto is issued by one or other of the belligerents to the representatives of neutral States. (See Vattel, iii. 4, 64; Hall, iii. i.; Woolsey, 122.) This is the present state of that Custom of European States which is

called international law, and represents the minimum required from those States which propose to assume over neutral commerce the rights of belligerents. As has been stated, the earlier law required actual notice from one belligerent to another—an honorable custom not yet extinct. (See Grotius, iii. 3, s. 3.)

The British Foreign Office is therefore entitled to demand ample reparation for the insult to the British flag offered by the Japanese war-ships, as well as the fullest pecuniary compensation to the families of the Englishmen killed and to the owners of the transport for the loss of their property. Even as between States of the European race, such would be the minimum right of the British Government, and it is to be trusted that British interposition will not be wanting in promptness and vigor in its dealings with Japan.

As regards a matter not so immediately concerning European Powers—the alleged slaughter of a thousand Chinese troops while struggling for their lives in the sea—the chief importance of the incident in its bearing on international law is the light it throws on the possibility of any real infiltration of Western ideas among non-European nations. The much-boasted adoption by the Japanese of European civilization—as if the mental habits which are the slow growth of thousands of years of the life of the European race could be put on as a garment in a few decades—the adoption of European “codes,” European “Houses of Parliament,” the language of European diplomacy, the adhesion to the Geneva Convention—all these reforms can be measured at their true value by consideration of the flagrant violation, not merely of the Geneva Convention, but of the most elementary ideas of common humanity involved in the indiscriminate slaughter of drowning men.

As the German and French Press—notably *Le Temps* and the *Vossische*—has urged for some time, the Great Powers of Europe should intervene, and by united action in Corea put an end to the disorder there, and at the same time put an end to this absurd ascription to the potentates of Japan and China of rights of belligerents in regard to European commerce.—*Law Journal*.

*EXPERTS IN HANDWRITING.*

*Regina v. Silverlock*, already referred to with respect to the form of an indictment for false pretences, raised another point of more interest. To prove the handwriting of the accused were called a police officer, who produced a letter and envelope written by the accused in his presence, and the solicitor for the prosecution, who had given considerable attention and study to handwriting, and had on several occasions professionally compared handwriting for purposes of evidence. The solicitor's right to speak as an expert was challenged, but his testimony was admitted, subject to reservation of a case on the point. For the defence it was argued that the solicitor was not an expert but a mere amateur, and an attempt was made to suggest that a man cannot be called as a witness to handwriting, who has not made a profession of studying handwriting, which led the Lord Chief Justice to observe that there were two classes of experts, those who made a thorough study of handwriting and those who made a business of testifying in the witness box as to their expertness; and in the end the Court had no difficulty in coming to the conclusion that a witness on a matter of opinion must be skilled in the subject on which he is called to give an opinion, but need not be in a particular business or profession, nor have passed any examination in the subject; or, to adopt the words of Mr. Justice Williams, 'it is necessary to show that the witness, either by his profession or by his habits and studies, is more competent than others to give his opinion.' The weight of testimony given as to opinion is a very different thing from the question of its admissibility. A man may know enough about the subject to assist the jury somewhat, but not enough to be of much assistance to them.—*Law Journal*.

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*DUELLING AT THE IRISH BAR.*

The late Mr. John Edward Walsh, who was Attorney-General for Ireland in 1866, and subsequently Master of the Rolls in Ireland till his death in 1869, wrote and published in 1840 a little book entitled "Ireland Sixty Years Ago," in which he directs attention to the practice of duelling at the Irish Bar towards the close of the last century.

Many men at the Bar, Mr. Walsh says, practising fifty (one .

hundred) years ago, owed their eminence not to legal ability, but to their powers as duellists. Mr. Walsh relates that a contemporary of his own consulted Dr. Hodgkinson, Vice-Provost of Trinity College, Dublin, then a very old man, as to the best course of study to pursue, and whether he should begin with *Fearne* or *Chitty*. The Vice-Provost, who had long been secluded from the world, and whose observation was beginning to fail, immediately reverted to the time when he had himself been a young barrister, and his advice was: "My young friend, practise four hours a day in a pistol gallery, and it will advance you to the woolsack faster than all the *Fearnes* and *Chittys* in the library."

Some noted instances of legal and judicial duelling in Ireland will be of interest. Mr. Curran, who became in 1806 Master of the Rolls in Ireland, while at the bar and a member of the Irish Parliament, fought a duel with Lord Buckingham, Chief Secretary for Ireland, because he declined to dismiss at his request a public officer. Mr. Curran also fought with the Attorney-General, Mr. Fitzgibbon—the weapons being enormous pistols twelve inches long. Mr. FitzGibbon afterwards became Lord Chancellor of Ireland and the Earl of Clare. His enmity drove Curran out of practice in the Court of Chancery at a loss, according to his own estimate, of £30,000.

John Scott, who as Earl of Clonmel died in 1798, while Chief Justice of Ireland, fought Lord Tyrawley and Lord Llandaff, and was a party in several other duels with swords and pistols. Marcus Patterson, who was a contemporary of the Earl of Clonmel, and was Chief Justice of the Irish Court of Common Pleas from 1800 till 1827, was Attorney-General from 1789 till 1800. He was distinguished, during the turbulent period which preceded the Union, for his duelling propensities, that he was always the man depended on by the Government to frighten a member of the Opposition, and so rapid was his promotion, that it was said he "shot up" into preferment. When in 1826 the question of retirement from the judicial bench was mooted to Lord Norbury, whose mental and physical powers were clearly failing, he immediately produced from a case in his study a brace of duelling pistols, and threatened to challenge anyone who would venture to mention the matter in his presence.

Mr. Hely-Hutchinson was a barrister of great eminence, and

Prime Sergeant. The holder of this office took precedence in Ireland of the Attorney-General. When practising at the Bar he fought many duels. He was subsequently, in 1774, appointed Provost of Trinity College, Dublin. He was anxious, when Provost, to establish and endow a professorship of the science of defence in the University of Dublin, and challenged and fought a Mr. Doyle, an Irish Master in Chancery.

Those instances, recorded by Mr. Walsh in "Ireland Sixty Years Ago," and by Sir Jonah Barrington in his "Personal Recollections," are startling. Mr. Walsh only writes of what he heard of the doings of a previous generation, but Sir Jonah Barrington, who lived in the Union period, testifies to what he had seen. Sir Jonah was himself Judge of the Irish Court of Admiralty, and a far-famed duellist.

It is perhaps worthy of note that Mr. Ambrose Hardinge Giffard, a member of the Irish Bar, fought a duel with another barrister, Mr. Bagnal Harvey, by whom he was wounded. Mr. Harvey was subsequently, in 1798, the leader of the Rebellion in the county of Wexford, and was executed for high treason. Mr. Giffard afterwards became, as Sir A. Hardinge Giffard, Chief Justice of Ceylon. He was paternal uncle of Lord Halsbury, the ex-Lord Chancellor of England.

The laws by which duelling is punishable were then, Mr. Walsh observes, as severe as now, but such was the spirit of the times that they remained a dead letter. No prosecution ensued, and even if it did no conviction would follow. Every man on the jury was himself probably a duellist, and would not find his brother guilty. After a fatal duel the judge would leave it to the jury whether there had been "any foul play," with a direction not to convict for murder if there had not.

"Duelling in Ireland," wrote Mr. Walsh in 1840, "is now happily a thing of the past." A few years afterwards, however, the old duelling spirit asserted itself at the Irish Bar on a memorable occasion. Mr. T. B. C. Smith, 1844, as Attorney-General for Ireland, conducted the State prosecution of Mr. O'Connell. Mr. FitzGibbon was one of the leading counsel for the defence. The report of the trial for the 30th Jan., 1844, in the State Trials, contains this remarkable passage: "The court having adjourned for luncheon, during the interval the Attorney-General sent a challenge to FitzGibbon."

On the judges resuming their seats, Mr. FitzGibbon complained of the conduct of the Attorney-General thus: "With a pistol in his hands he says to me, I'll pistol you unless you make an apology, and I cannot help telling him now such a course won't draw an apology from me." The Attorney-General admitted that the letter was written hastily, but under circumstances of great provocation. The good offices of common friends were invoked, and the Chief Justice, insisting on an assurance from both gentlemen that the quarrel would proceed no further, thought that "this unpleasant matter might at once be set at rest" (see Reports of State Trials, New Series 5, pp. 366-368).

This was the last instance of a serious challenge at the Irish Bar. Mr. Smith subsequently became Master of the Rolls, and was the immediate predecessor of Mr. Walsh in that office. Mr. FitzGibbon became a Master in Chancery. His son is one of the Lord Justices of Appeal in Ireland.—*Law Times*.

#### CHANCE VERDICTS.

In *Wright v. Abbott*, Mass. Supreme Judicial Court, 36 N. E. Rep. 62, a quotient verdict was set aside, on the testimony of the officer in charge of the jury, who overheard their 'deliberations.' The Court said: "It is certainly not the duty of an officer in charge of a jury to listen to the deliberations of a jury, but, if he does, his testimony cannot be excluded on the ground that his knowledge was obtained in this manner, if it is otherwise competent. The rule excluding testimony of the conduct of jurors in the jury-room when deliberating upon a verdict ought to have some limits. It seems that in England it has been finally settled that the affidavit of a juror will not be received to show that the verdict was determined by lot (*Vaise v. Delaval*, 1 T.R. 11; *Owen v. Warburton*, 1 Bos. & P. 326; *Straker v. Graham*, 7 Dowl. 223, 225). The weight of authority in this country also is that the affidavits or the testimony of jurors to show such a fact will not be received (*Dana v. Tucker*, 4 Johns. 487; *Cluggage v. Swan*, 4 Bin. 150; *Brewster v. Thompson*, 1 N.J. Law, 32. *Grinnell v. Phillips*, 1 Mass. 540, is regarded as overruled in *Woodward v. Leavitt*, 107 Mass. 453, 462). It has always been held that if a verdict is obtained by resorting to chance, or by drawing lots, it will be set aside (*Mitchell v. Ehle*, 10 Wend. 595; *Donner v. Palmer*, 23 Cal. 40; *Ruble v. McDonald*, 7 Iowa, 90; *Birchard v.*

*Booth*, 4 Wis. 67; *Dorr v. Fenno*, 12 Pick. 520; *Forbes v. Howard*, 4 R. I. 364). In *Vaise v. Delaval* (*ubi supra*), where a verdict was obtained by tossing up, Lord Mansfield said: "The Court cannot receive such an affidavit from any of the jurymen themselves, in all of whom such conduct is a very high misdemeanour; but in every such case the Court must derive their knowledge from some other source, such as from some person having seen the transaction through a window, or by some other means." In *Wilson v. Berryman*, 5 Cal. 44, the verdict was what is called a "quotient verdict"; and the Court, while conceding that the affidavit of a juror could not be received, admitted the affidavit of the undersheriff that the affidavit of the juror was true."—*Green Bag*.

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#### GENERAL NOTES.

**ELECTRIC RAILROADS.**—Street cars propelled by electricity running along a public highway, it is held in *Newark Passenger R. Co. v. Bloch*, (N. J.) 22 L. R. A. 374, cannot be run at a rate of speed which is incompatible with the lawful and customary use of the highway by others. The court holds that there is no just analogy between the right of such a railway company and that of an ordinary railroad company running trains across a highway at grade, and that no public demand undefined and unrecognized by law can justify a speed greater than is consistent with the safety of persons on highways.

**LEGAL ANECDOTES.**—Sir Fletcher Norton, noted for his scant courtesy and arrogance, while arguing a point of law before Lord Mansfield, relating to manorial rights, proceeded to cite his personal experience in the subject in issue. 'I can illustrate the point, my lord, in my own case, for I have two little manors.' 'We all know that, Sir Fletcher,' interposed the Chief Justice, with his blindest smile.—*Pall Mall Gazette*.

**NECESSARIES OF LIFE IN ILLINOIS.**—From a standard and entirely sober digest of Illinois reports, under the title "Carriers" and a subdivision as to baggage, we quote the following digest paragraph: '56. Two revolvers in the trunk of a grocer who went into the country to purchase butter: Held, that but one revolver was reasonably necessary.' So says the *Green Bag*.

**LORD ESHER AND MRS. CATHCART.**—In one of the innumerable appeals brought by Mrs. Cathcart recently, the Master of the Rolls indulged in some plain speaking. He reminded her he listened to her because she was born a lady, and was still a woman, and, in giving judgment, said the truth was this lady was not mistress of her mind. She brought frivolous appeals, and tormented a number of suitors with litigation which was perfectly despicable. What ought to be done by people against whom she brought actions was to apply to the courts for security for costs. If one-tenth part of what she said was true, she could, if she had any sense at all, have gone on with the counterclaim, but she had persistently disobeyed every rule of the court applicable to the cause. She would not have counsel and solicitor, and naturally in consequence everything she did was wrong. He believed she would ruin herself, for she was a terribly obstinate woman.—*Law Journal*.

**LARCENY ACT AMENDMENT BILL.**—The Lord Chancellor, in moving the second reading of this bill (which has since passed through all its stages), explained that its object was to make a small but important change in the criminal law of England. As the law now stood, property might be stolen outside England and received in England with the full knowledge that it had been stolen, without the person so receiving it being amenable for any offence in this country. He might, in fact, hold the stolen property without being subject to any proceedings under the criminal law of England. The view taken by the judges had been that, inasmuch as a person could only be punished here for receiving with a guilty knowledge goods which had been feloniously stolen, and inasmuch as, outside this country, there was no such thing as "felony," a person in England could not be held to have feloniously received goods which had been stolen abroad. That was a technicality of an extreme kind, and one which he thought their lordships would agree ought not to stand in the way of justice. The object of the bill merely was to provide that if goods were stolen abroad and were brought to this country under circumstances which, if the offence were committed here, would render the receiver liable to conviction under our criminal law, such person should no longer be able to escape, on the mere technicality at present existing.

**ENJOINING A PRIZE FIGHT.**—The spectacle of a judge at Jack-

sonville, Florida, issuing an injunction against the sheriff to prevent him from interfering with a prize fight, is one calculated to fill the breasts of the right-thinking members of the legal profession with indignation and shame, and to send the mind upon a search for the motive which could have prompted such extraordinary action. A judge having the slightest acquaintance with the principles of equity should have known that the writ of injunction is never issued in matters of crime, with one or two limited and marked exceptions, in which prize fighting is not included. One of those exceptions is that an injunction will sometimes issue to enjoin a nuisance; but it is not among those exceptions that an injunction will be issued to protect a nuisance—that is, to restrain the sheriff from preventing the perpetration of a public nuisance. If it is answered that there is no statute law in Florida making prize fighting illegal, the reply may confidently be urged that an ordinary public prize fight is a nuisance at common law. But if it is not a nuisance by the common law of Florida—and if it is not, so much the worse for that law—then the elementary principle remains that an injunction is only used by Courts of equity for the protection of the rights of property and business. Now, what right of property or of business is involved in a prize fight? The possible right to property in a stake of 20,000 dollars, which is put up and which is to be had by the winner, and the business of engaging in a beastly encounter for the purpose of winning a bet.—*American Law Review*.

**GROUNDS OF DIVORCE.**—The *Omaha Bee* reports that in San Francisco a sensitive husband is suing his wife for divorce because she bleached her hair. In his petition he says: "Bleached or artificially colored hair is easily distinguished as such and does not appear natural, nor does it deceive any person, but it is perfectly patent and noticeably conspicuous. It is regarded by the majority of right thinking persons as an indication of a loose, dissolute and wanton disposition, and is regarded as and commonly held to be a practice never affected by modest, pure and respectable women." The husband claims that he is mortified and humiliated on account of the change in the color of his wife's hair. He adds: "She is a brunette naturally. Her hair is of a chestnut brown color, which in its normal state is modest and becoming, and harmonizes with the natural color of her skin and eyes. Since we married she has, against my wishes and protest, and with intent to vex, annoy, exasperate and shame me, dyed her hair and changed its shade to a conspicuous and showy straw or canary color. As a consequence of this artificial coloring, she has been obliged to paint her face to secure an artificial complexion in keeping with the artificial color of her hair. The combination has given her a giddy, fast and sporty appearance."

# THE LEGAL NEWS.

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VOL. XVII

SEPTEMBER 15, 1894.

No. 18.

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## *SCENES IN COURT, FROM THE YEAR BOOKS.*

"How one would have liked to see one of those ancient Courts under the Plantagenets!" was the remark of Wills, J., at a meeting of the Selden Society,—on an eyre, say at Winchester or Hereford,—the King's Justices, the stout old sheriff with his posse, the bailiffs, the knights, the jurors, the sergeants of the law "ware and wise" in their hoods, the appellees and prisoners, and all the motley crowd of suitors and spectators. Where be they all now? They live forgotten in the dusty folios of the Year Books—those Year Books rich with the spoils of time to the student of our legal history, to the ordinary reader an arid waste of legal technicalities. Yet here and there, diversifying the dreariness, we come upon some little oasis of human interest, a lively wrangle between counsel, a glimpse of national manners, an outbreak of testiness on the part of the judge, it may be a "good round mouth-filling oath," such as Queen Elizabeth in her best vein could swear, according to Mr. Froude. A Scotch young lady, lamenting her brother's addiction to the bad habit of swearing, added apologetically, "but nae doubt swearing is a great set aff to conversation;" and no doubt swearing from the bench is very effective at times. So at least the King's Justices thought, for they swear in the Year Books with the force and freedom of Commodore Trunion. "Do so in G—'s name," "By G— they are not," "Go to the devil" (*allez aut grant diable*)—this to a bishop—are among the flowers of judicial rhetoric. When Hull, J., flew into a passion at the sight of a bond in restraint of trade, and swore "*per Dieu si le plaintiff fuit icy, il irra al prison*," (2

Hen. V. fo. 5, pl. 26), he was only keeping up the tradition of the Bench. Counsel swear by St. Nicholas, which has an appropriateness of its own (21 & 22 Ed. 1 Br. Chr. 31, iv. 480).

“A good and virtuous nature may recoil  
In an imperial charge,”

says Shakespeare in “Macbeth.” The justices felt that they represented the King’s person and were naturally inclined to be a little absolute in swearing and laying down the law. Cases did not then embarrass them. “Never mind your instances,” says Meetingham, J. to counsel who was citing some previous decision. (20 & 21 Ed. 1. Br. Chr. 31, iv. 80.) Here is a little scene, suggestive of the Court in *Bardell v. Pickwick* :—

Berriwick, J., (to the Sheriff).—“How is it you have attached these people without warrant? For every suit is commenced by finding pledges, and you have attached though he did not find pledges.”

The Sheriff—“Sir, it was by your own orders.”

(Mem. by reporter).—“If it had not been, the Sheriff would have been grievously amerced. Therefore take heed.” (21 & 22 Ed. 1. Br. Chr. 31, iv.)

On another occasion a jury was shuffling, on a question of legitimacy.

Rouberry, J., (to the Assize).—“You shall tell us in another way how he was next heir, or you shall remain shut up without eating or drinking until to-morrow morning.” (21 & 22 Ed. 1. Br. Chr. 31, iv. 272.) This quickly brought the right answer. Counsel do not escape unscathed.

Hertford, J., (to counsel).—“You do bad service to your client. You only take care to get to an averment. You have pleaded badly.” This must have been trying for poor Mr. Phunky. The following is more racy. In a writ of *Monstravit de Compoto*, &c., Hampone (counsel) begins in this seemingly inoffensive manner: “Whereas he supposes by his writ that he has nothing whereby he may be summoned or attached to render this account, we tell you that he has assets in T:” etc.

Hengham, J.—“Stop your noise (lessez vostre noyse) and deliver yourself from this account, and afterwards go to the Chancery and purchase a writ of deceit, and consider this henceforth as a general rule.” (30 & 31 Ed. 1. Br. Chr. 31, V. 6.) Let us hope this last statement was lucid to the practitioner of the day.

The words at the beginning certainly seem rude, but perhaps they are only what a counsel of that day calls "curial words" (*paroles de la Court*). "Every word," he says, "spoken in Court is not to be taken literally. They are only curial words." (20 & 21 Ed. 1, Br. Chr. 31, iii)—a remarkable anticipation of a certain celebrated occasion when the Pickwickian sense of the word "humbug" was explained.

However, counsel were able to take care of themselves then as now.

"Sir," (this was the mode of addressing the Court), "Sir," says Toudeby, "we do not think that this deed ought to bind us, inasmuch as it was executed out of England" (at Ghent).

Howard, J.—"Answer to the deed."

Toudeby (counsel)—"We are not bound to do so for the reason aforesaid."

Hengham, J.—"You must answer to the deed, and if you deny it then is it for the Court to see if it can try," etc.

Toudeby—"Not so did we learn *pleading*." (30 & 31 Ed. 1, Br. Chr. 30, II. 72). This probably in an audible aside.

The independence of the Bar is emulated by the reporters. One Robert was charged with harboring an outlaw. The outlaw procured a charter of pardon from the King, and Robert contended that this purged his offence. Berriwick, J., was like Dr. Johnson; his pistol having missed fire he knocks down his opponent with the butt end of it. "Robert, pay your fine to the King, for you cannot deny you harbored him, and that was a great trespass against the King," etc.

"Note, the Justice did this rather for the King's profit than in accordance with the law, for they gave this decision *in terrorem*." (30 & 31 Ed. 1 Br. Chr. 30, I. 506). Brave reporter! This is better than surreptitiously keeping a drawer like Campbell for Ellenborough's bad law. Later on a reporter—was it the same?—mentions a ruling with approbation as "correct."

The proper construction of the Statute of Westminster came in question.

Hengham, J.—"Do not gloss the statute. We understand it better than you, for we made it, and it is often seen that one statute extinguishes another." Often! we should think so. Counsel of course collapsed. Still, the learned judge failed to appreciate the distinction of intention and intendment. The dictum contrasts unfavorably with the modesty of the late Lord

Justice James in referring to a previous decision of his own, "which," he would say, "is an authority, though I joined in it."

Technicality in these early cases is rampant. The rule is, "Find a flaw, however microscopic, in the writ, and pray for judgment." In a "Petit Cape," Agnys was written instead of Agnes. Asserby (for Agnes) thought thereby to upset the whole process, and he said, "Sir, he sued the Petit Cape against Agnys, whereas he ought to have sued it against Agnes. Judgment of the bad writ."

Metingham, J.—"It is not the fault of the party, but it is the fault of our clerk, and that fault will be amended by us, and so we tell you that the process is sufficiently good, and you are not courteous in speaking in that fashion."

We find Hengham, J., obliged, on another occasion, to observe, "That is a sophistry, and this place is designed for truth." (30 & 31 Ed. 1, Br. Chr. 31, v. 20.) No applause is recorded, however, as following this excellent sentiment. Brumpton, J., has even to admonish counsel, "See that there is no deceit in your pleadings." (30 and 31 Ed. 1, Br. Chr. 30, v. 362.) Craftiness in pleading was the order of the day, like the subtleties of the schoolmen. Indeed, Durand, a thirteenth century writer, recommends advocates to adopt what he calls "a vulpine simplicity." "You have admitted this, God help you," says the Court on one occasion. On another, counsel had made a slip in vouching the wrong person.

Robert (on the other side)—"We pray judgment of this bad vouch er."

Warwick (who had made the slip)—"Leave to imparl for God's sake, sir."

(Mem. by reporter)—"He obtained it with difficulty." (21 & 22 Ed. 1, Br. Chr. 31, iv. 492).

This excited state of counsel was not altogether professional keeness. Amercement was the common consequence of an unsuccessful suit. People are always being amerced for false, that is, unfounded claims, sometimes sent to prison. Witness the following sad tale of an attorney. It was a case of a claim to land, and alleged default in attending on a given day. B.'s attorney held to the default. The Justice asked on what day the default was made. The attorney answered that it was on the first day, and it was found that it was on the second day, and afterwards (one or two or three days afterwards) the attorney came and said

that it was on the second day, and he held to the default as before.

Mettingham, J.—“My fine friend (bel amy), the other day when the worthy man was ready to make his law you said that the default was made on the first day, and afterwards you came and said that the default was made on the second day, and thus you vary in your words and deeds; this Court doth adjudge that you take nothing by your writ, but be in mercy for your false plaint.” (21 & 22 Ed. 1, Br. Chr. 31, iv. 460).

A Prior had hung a thief (who had confessed), and got himself into hot water about it.

Spigournel, J.—“Call the Prior.”

The Prior came.

Spigournel, J.—“Do you claim infangthef and utfangthef.”

Hunt, (counsel)—“Sir, he claims to have infangthef.”

Spigournel, J.—“Was the felony committed within the limits of your franchise?”

Hunt—“No, sir.”

Spigournel, J.—“Where then?”

Hunt—“Sir, we do not know.”

Spigournel, J.—“Now, Sir Prior, do you mean to hold a plea in your Court of a felony committed out of the limits of your franchise, when you claim only infangthef?”

(Counsel for the Prior turned and doubled, but to no purpose.)

Spigournel, J., (to the Prior)—“Yon have well heard how it is recorded that you went to judgment on him who acknowledged himself a felon without presentment by the Coroner who can bear record, whereas your court is not a court of record, and this you cannot deny: attend judgment on Monday.” (30 & 31 Ed. 1, Br. Chr. 30, i. 500).

What befell the unlucky Prior does not appear. The Crown was getting very strict, and rightly, about these franchises.

Default of appearance was a common incident then as now, perhaps commoner, owing to the difficulties of travelling, as the following illustrates. It was a case of a Writ of Right between Roger de Pengerskeke, demandant, and John de Leicester and Joan his wife, tenants. On the day of the return of the writ to cause the four knights to come and choose the assize, John did not turn up and the default was recorded. On the next day John came to the bar and answered for his wife as attorney, and for

himself in his own person, and said that the default ought not to hurt him because he was hindered by the rising of the waters.

The Demandant's Attorney—"Where were you hindered?"

The Tenant—"At Cesham."

Mallore, J.—"At what hour of the day?"

The Tenant—"At noon."

The Demandant's Attorney—"And we pray judgment if from that time he could be here at the hour of pleading, since it is fifteen leagues away from here. Besides he began his journey too late."

The Tenant—"I travelled night and day."

Mallore, J.—"What did you do when you came to the water and could not pass? Did you raise the hue and cry and the menée, for otherwise the country would have no knowledge of your hindrance?"

The Tenant—"No, Sir. I was not so much acquainted with the law, but I cried and hullooeed" (*jeo criay e brayay*).

The Demandant's Attorney—"Judgment outright of his default, and we pray seizin of the land."

Mallore, J.—"Will you accept the averment that he was hindered as he says?"

The Demandant's Attorney—"If you adjudge so, Sir, but since he has admitted that he did not raise the menée, judgment of his admission."

Hengham, J.—"Keep your days until to-morrow." And on the morrow they were adjourned to the Quinzein of Trinity, which to some seemed strange. (30 & 31 Ed. I, Br. Chr. 30, v. 122.) Not to us, familiar with the law's delay. But space is limited, and we must drop the curtain.—*Edward Manson in the "Law Quarterly Review."*

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### IDENTIFICATION OF PRISONERS.

In the course of a paper on 'Anthropology,' read at the meeting of the British Association, Sir W. H. Flower said:—

The importance of being able to determine the identity of an individual under whatever circumstances of disguise has long been apparent to all who have had anything to do with the administration of the criminal law. Photography was eagerly seized upon as a remedy for the difficulties hitherto met with. Much help has been derived from this source, but also much em-

barrassment. Changes in the mode of wearing the hair and beard differences of costume, the effects of a long lapse of time, may make such alterations that recognition becomes a matter at least of uncertainty. The enormous expenditure of time and trouble that must be consumed in making the comparison between any suspected person and the various portraits of the stock which accumulates in prison bureaus may be judged of from the fact that in Paris alone upwards of 100,000 such portraits of persons interesting to the police have been taken in a period of ten years. The primary desideratum in a system of identification is a ready means of classifying the data upon which it is based. To accomplish this is the aim of the Bertillon system. Exact measurements are taken between certain well known and fixed points of the bony framework of the body, which are known not to change under different conditions of life. All particulars are recorded upon a card, and by dividing each measurement into three classes, long, medium and short, and by classifying the various combinations thus obtained, the mass of cards, kept arranged in drawers, is divided into groups, each containing a comparatively small number, and therefore quite easily dealt with. Photographs and other means of recognition, as distinctive marks and form of features, are brought into play, and identification becomes a matter of certainty. If the combination of measurements upon a new card does not coincide with any in the classified collection in the bureau, it is known with absolute certainty that the individual being dealt with has never been measured before. In France, a large proportion of old offenders, knowing that concealment is hopeless, admit their identity at once, and save a world of trouble and expense to the police by ceasing to endeavour to conceal themselves under false names. Various representations upon this subject have been addressed to our Home Office. A committee was appointed, on October 21, 1893, by Mr. Asquith, consisting of Mr. C. E. Troup, of the Home Office; Major Arthur Griffiths, inspector of prisons; and Mr. Melville Leslie Macnaghten, chief constable in the Metropolitan Police Force, with Mr. H. B. Simpson, of the Home Office, as secretary, to inquire and report. No pains were spared to obtain a thorough knowledge of the advantages of the Bertillon system as practised in France, and the result was the recommendation of that system, with certain modifications, for adoption in this country, with the addition of the remarkably

simple, ingenious, and certain method of personal identification first used in India by Sir William Herschel, but fully elaborated in this country by Mr. Francis Galton—that called the ‘finger-mark system.’ In the House of Commons, on June 26, the Home Secretary announced that the recommendations of the committee had been adopted. Simple and insignificant as in the eyes of all the world are the little ridges and furrows which mark the skin of the under-surface of our fingers, existing in every man, woman and child, they have been practically unnoticed, until Mr. Galton has shown, by a detailed and persevering study of their peculiarities, that they are full of significance, and amply repay the pains and time spent upon their study. It is not to be supposed that all the knowledge that may be obtained from a minute examination of them is yet by any means exhausted, but they have already given valuable data for the study of such subjects as variation unaffected by natural or any other known form of selection, and the difficult problems of heredity, in addition to their being one of the most valuable means hitherto discovered of fixing personal identity. The *Tichborne Case* hung upon an issue which might have been settled in two minutes if Roger Tichborne, before starting on his voyage, had but taken the trouble to imprint his thumb upon a piece of blackened paper. It was not until the hundred and second day of the first trial that attention was called to the fact that Sir Roger Tichborne had been tattooed on the left arm with a cross, anchor, and a heart, and that the Claimant exhibited no such marks. The case broke down at once. The second trial for perjury occupied the Court 188 days. The issues were, however, more complex than in the first trial, as it was not only necessary to prove that the Claimant was not Tichborne, but also to show that he was someone else. The confidence that is now reposed in the methods of anthropometry or close observance of physical characters, and in the persistence of such characters through life, would have greatly simplified the whole case; and all who have nothing about their lives they think it expedient to conceal should get an accurate and unimpeachable register of all those characteristics which will make loss of identity at any future period a sheer impossibility.

## CHANCERY DIVISION.

LONDON, July 25, 1894.

*In re HYSLOP. HYSLOP v. CHAMBERLAIN. (29 L. J.)**Executor—Debt—Appointment of debtor as executor—Incomplete gift.*

This was an adjourned summons, raising the question whether the defendant, the Rev. H. H. Chamberlain, was accountable to the estate of the testator for a debt of £100.

The testator, by his will, dated October 10, 1889, appointed his brother-in-law (the defendant Chamberlain) and his sister (the plaintiff) his executors. He gave to his brother-in-law £500 in consideration of his undertaking to be 'my executor and carrying out my instructions and wishes to the best of his ability.' The testator died in May, 1891.

The defendant Chamberlain owed the testator £100. A letter of instructions, written by the testator (addressed to the defendant Chamberlain), was found, after his death, with his will, in a box, which letter contained the following sentence: 'The hundred pounds I lent you does not form part of the money I left you; it is cancelled.'

This document was not communicated to the defendant Chamberlain during the lifetime of the testator.

North, J., considered that the letter of instructions was a testamentary document, not duly executed; and that it was not admissible in evidence. He, therefore, held that the defendant Chamberlain was accountable to the estate for the £100.

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*OVERHANGING TREES.*

The right of an owner of land to cut away the boughs of his neighbour's tree which overhang his land has been the law for centuries, as appears from such venerable authorities as 'Brooke's Abridgement Nuisance,' p. 28, and 'Viner's Abridgement, Trees E,' and the Court of Appeal, in the recent case of *Lemmon v. Webb*, 63 Law J. Rep. Chanc. 570, showed little appreciation of the argument that his right could be taken away by the acquisition of an easement by the tree-owner compelling the landowner after the lapse of years to submit to the gradually increasing invasion on the very imperfect analogy of the acquisition of an easement in respect of an overhanging structure of bricks and mortar. What is true of overhanging boughs is, as the case

decides, equally applicable to intruding roots. The law so established is, we may add, in direct accordance with the view taken in 'Gale on Easements,' 3rd edit. pp. 419, 420. More arguable was the other point in the case—viz. whether the landowner could, while he confined his operations to his own land, himself abate the nuisance without first giving notice to his neighbour. The general law is that where a person suffers from a nuisance, as, for instance, a collection of filth, upon another person's land, he can enter on the other person's land and abate the nuisance without notice if the person in possession of the land himself created the nuisance, or in case of emergency, but that otherwise he must first give notice to the person in possession and request him to abate it (*Jones v. Williams*, 12 Law J. Rep. Exch. 249; 11 M. & W. 176); and similarly in the case of trees, if it were necessary to go on the land of the owner of the tree, a previous notice and request would be requisite, but so long as the landowner confines his operations to his own land the case of *Lemmon v. Webb* is a distinct authority, in accordance with Lord Ellenborough's ruling in *Pickering v. Rudd*, 4 Camp. 219; 1 Stark. N. P. 56, that the landowner can lawfully abate the nuisance without any previous notice or request. The law on the subject cannot be more clearly or more concisely stated than in the following passage from the judgment of Lord Justice Lindley: "The owner of a tree has no right to prevent a person lawfully in possession of land into or over which its roots or branches have grown from cutting away so much of them as projects into or over his land, and the owner of the tree is not entitled to notice unless his land is entered in order to effect such cutting. However old the roots or branches may be, they may be cut without notice subject to the same condition. The right of the owner or occupier of land to free it from such obstructions is not restricted by the necessity of giving notice so long as he confines himself and his operations to his own land including the space vertically above and below the surface."—*Law Journal*.

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#### ACTIONS AGAINST JUDGES.

Will an action lie against a judge of a Court of Record for anything done in his judicial capacity? The Court of Appeal have just answered this question in the negative in a case—*Anderson v. Gorrie*—where a judge of the Supreme Court of Trinidad and

Tobago was both alleged and proved to have acted maliciously. We entertain no doubt that the decision was legally correct. Indeed, the point was practically covered by previous authority—*Fray v. Blackburn*, 3 B. & S. But we are very far from being equally certain that the rule of public policy underlying it is a sound one. It is said that no action ought to lie against a judge because (1) the Constitution has already safeguarded the rights of litigants by the power of removal with which it has invested the Crown, and (2) if such actions were competent members of the judicial Bench would be perpetually called upon to defend themselves against the spleen of disappointed litigants. Both grounds are substantial; but neither is, in our opinion, conclusive. The power of removal is an effective weapon against a judge who persistently and indiscriminately abuses his office. It is not effective in cases of isolated tyranny or oppression. Suppose a judge—say in a distant colony—conceives a personal dislike to a suitor, and gratifies it in a case which the latter has before him, how could the victim of his injustice obtain redress by applying to the Colonial Secretary? There would immediately be a stream of petitions to the Colonial Office from litigants and public bodies who had never any reason to be dissatisfied with the unjust judge in favor of his retention, and the Colonial Secretary would be bound to take cognizance of, and, in the absence of clear proof, give effect to, these representations. Again, if it were deemed expedient to concede to litigants a limited right of action against judges, no inconvenience need arise from the concession. It would be perfectly easy to make the statement of claim in such cases run the gauntlet of such a preliminary inquiry as pauper appeals now undergo in the House of Lords, or to require the delivery of particulars as to the sufficiency of which an appeal committee could judge. We are not satisfied that the decision in *Anderson v. Gorrie* does not justify a very grave consideration of the question whether the time has not come when the rule of law on which it rests should be revised.—*Ib.*

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#### MADNESS AND CRIME.

The controversy between lawyers and doctors as to the criminal responsibility of the insane is so inveterate, and has hitherto been both so jejune and so largely academic, that its reappearance at the present dull season may not seem to call for any com-

ment. But the definite proposal made at the recent meeting of the British Medical Association, that the House of Lords should be invited without delay to ask the judges to answer "certain questions with regard to the defence of insanity in criminal cases," imparts to the latest revival of this interminable feud not a little extrinsic interest and importance. Five distinct tests or criteria have at different periods in the history of English law been employed for the purpose of determining the criminal responsibility of the insane. First we have what has been commendably described as "the boy of fourteen" theory. For this we are indebted to Sir Matthew Hale. "Such a person," said that great jurist, "as laboring under melancholy distempers hath yet ordinarily as great understanding as a child of fourteen years, may be guilty of treason or felony." In the beginning of the eighteenth century this primitive standard was superseded. One would gladly think that its abandonment was due to the eventual perception by the judges of the day that no two states of mind could be more unlike or less capable of comparison than the healthy immaturity of a boy of fourteen and the diseased maturity of a lunatic. But, unfortunately, this comforting hypothesis is untenable. For the boy of fourteen theory gave place to a still more unscientific test. On the trial of Edward Arnold, at Kingston, in 1723, for wounding Lord Onslow, Mr. Justice Tracey, in charging the jury, said that "a prisoner, in order to be acquitted on the ground of insanity, must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no (*sic*) more than an infant, a brute, or a wild beast." No such lunatic ever existed, and the only excuse that can be offered for Mr. Justice Tracey's famous dictum is that he merely gave an exaggerated and inaccurate description of the violent and acute mania to which the asylum system of his day steadily reduced all other types of insanity. The "wild beast" theory, however, marks the lowest depth to which the law of England as to the criminal responsibility of the insane descended. Its subsequent ascent has been curiously fitful and irregular. On the trial of Hadfield in 1800 for shooting at George III. in Drury Lane Theatre, Lord Chief Justice Kenyon told the jury that the prisoner's responsibility depended on the question "whether at the very time when he committed the act his mind was sane." But this advance was not long maintained. For in 1812, on the trial of Bellingham for the murder of Mr. Perceval in the lobby

of the House of Commons, Sir James Mansfield prescribed another test of punishable insanity—namely, whether the accused possessed sufficient capacity to distinguish between right and wrong in the abstract. In the course of time this theory of responsibility also was felt to be inadequate. Scientific observers of the phenomena of mental disease established the existence of a type of lunatic whose general notions of right and wrong were perfectly clear and correct, and who nevertheless committed acts forbidden alike by morality and by law, under a fixed belief that his conduct was not only pardonable but meritorious. It might well be that such persons deserved punishment. But it was certain that the existing law offered little guidance as to the principles on which their punishment should be based. This deficiency the present legal test of lunacy purports to supply. It is embodied in answers given by the judges to questions propounded to them by the House of Lords after the acquittal of Daniel Macnaughton, in 1843, on the charge of having murdered Mr. Drummond, the private secretary of Sir Robert Peel; and it makes the guilt or innocence of a person accused of a crime, and defended on the ground of insanity, depend on whether he did or did not “know the nature and quality” of his act at the time of committing it. Against this standard of responsibility the British Medical Association is now in full tilt, and not without reason. The “rules in *Macnaughton's Case*” represent accurately enough the state of medical knowledge in 1843, and are still comparatively harmless when judiciously manipulated. But they ignore the fact that mental disease may, and does, impair its victims’ wills, as well as their other faculties; and, after the criticisms that have been passed upon them by judges so eminent as the late Lord Coleridge, the late Sir James Stephen, and Sir Henry Hawkins, it is high time they were revised. We regard, however, with considerable apprehension the proposal that the revision should take the form of questions put to the judges by the House of Lords. We should have thought that this species of catechism had already been sufficiently discredited by the experiment of 1843; and we know of no other authority for the proposition that the House of Lords has a right to question the judges except in the exercise of its legislative or judicial functions. What is wanted is that some barrister should be found of sufficient daring to challenge the authority of the Macnaughton “rules” in defending a prisoner on whose behalf a plea of insan-

ity is put forward. There is every reason to believe that the mental soil of the Bench is already not unprepared for such a suggestion. And, in any event, the point would be brought before the Court for Crown Cases Reserved—a tribunal undoubtedly competent to decide it.—*Saturday Review*.

#### GENERAL NOTES.

**TRAVELLERS' RIGHTS.**—Disputes so often arise between railway travellers of conflicting tastes and different social status that it would seem desirable to have some means of enforcing certain elementary comities of the road—such, for instance, as the right of a traveller who leaves his carriage at a wayside station for refreshments to preserve his seat from incoming travellers, some rule as to preferential treatment on a long-distance journey when a train is overcrowded, and as to the ventilation of a carriage *en route*. This last point, however, appears to be on the way to settlement. A general dealer was summoned at Peterborough for disorderly conduct in a train from King's Cross to Peterborough. He and his wife occupied one end of a third-class carriage and a clergyman and his wife the other end. Contrary to what might have been expected, the dealer opened his window and the clergyman preferred to keep his closed. The dealer wanted both open, and, on the clergyman objecting, used language unsuited for ears ecclesiastical, and the dispute ended in the Police Court, where it was shown to the justices that a bye-law of the Great Northern Railway Company gives the control of each window to the person seated nearest to it—we presume to the person who would be most affected by the dust and air if it were open. The rule, so far as it goes, is good; but is not a complete code for the settlement of difficulties between travellers of incompatible temperament, or for preserving a respirable atmosphere in a railway carriage.—*Law Journal*.

**AUSTRALIAN JUDGES AND THE ENGLISH BENCH.**—It is remarkable that, while the Imperial Government shows itself so alive to the advantage of transferring an able colonial bishop to a similar position in England, it neglects all the convenience and utility that would be secured by similarly taking an eminent colonial judge and placing him on the English Bench. The advantages of such a course are apparent. In the first place, there is no reason why this should not be done. Whatever may be the imperfections of our political life, the controlling influence of

public opinion has maintained a high degree of care in the selection of judges of the superior courts. We have in these colonies no reason to be other than satisfied with the way in which our judges are appointed, and with the way in which they perform their duties and uphold the honour and dignity of their position. These conditions would only be improved were there an open possibility that any judge might some day be selected to fill a place on the English Bench. Then as to the positive advantages that would ensue from this course, we must remember that although we possess law-making institutions and powers, and use them freely, the law which is administered in our courts is substantially English law. Indeed, although within the wide scope of the empire judges in various places administer English law, civil law, Dutch law, French law of the old feudal days, Hindu law, Mahomedan law, and the laws of many other codes and creeds, the ultimate principles and procedures by which all these various laws are applied and interpreted are the principles and procedures of the law of England. England furnishes a court of ultimate appeal, by resort to which cases coming from every part and every court and every system of jurisprudence in the empire may be heard and finally decided. It could not but redound to the harmony and uniformity of law administration throughout the empire if judges of mark and eminence were occasionally taken from the colonial courts and appointed to the English Bench, with a view of their ultimately being promoted to the final Court of Appeal. If in objecting to this the low ground were taken that the British Bar yields in abundance candidates and expectants for all the prizes available, the answer is that this consideration, which must be equally operative within the church, does not prevent the selection of successful colonial prelates to become English bishops. There is every reason to believe that a similar practice would yield results of at least equal value if applied to our judges, and it is not apparent why it is not sometimes adopted.—*Sydney Morning Herald*.

**DR. DE LASKIE MILLER ON EXPERT TESTIMONY.**—At a recent meeting of the Practitioners' Club in Chicago, Dr. de Laskie Miller, a retired physician of great eminence, and an emeritus professor in Bush Medical College, at the close of a debate on the subject of expert testimony, used the following language: "In the trial of a case it will be conceded that the intent should be to

present the evidence in such form that it can be comprehended by the juror. It will not do to say that a scientific and technical subject cannot be apprehended by the intellect of the average juror. This would be a confession that the introduction of expert testimony is a farce. It seems to me that not only the facts but also the logical conclusions of evidence can be reduced to simple terms and be presented in such form that a juror of ordinary intelligence can comprehend them and their bearings upon the points in issue. It will lessen a verbiage if the dogmatic form is assumed. Then it may be allowable to assert that no rights of the parties in a case at law need be restricted in order to accomplish the end desired. The parties may call their expert witnesses as heretofore, and as they have a right to do. The court should have authority, and exercise a proper discretion, in limiting the number of experts which may be called. Now we come to the most important innovation, which gives the promise of relief to the embarrassment of the conscientious juror and greater confidence in the justice of the verdict. The court should be empowered to summon a witness (one or more) chosen on account of integrity and good standing as members of society, and possessing superior knowledge and practical experience in the specialty involved in the case. Such a witness or witnesses will take the stand free from every suspicion of partisanship. The counsel, with the judge, shall formulate hypothetical questions, shall include every medical fact and principle involved in the issue. The question or questions thus formulated shall be read to the witness by the court, and oral questions leading to further elucidation shall be proper, but may be restricted in the discretion of the court. A witness of the character indicated will be able to reduce his testimony to the simplest terms to unravel perplexing complications. It seems hardly necessary to add that the court will not summon experts in every case when experts are called by the prosecution and defence, but in cases of unusual importance, or when the evidence introduced by the parties is contradictory or complicated, the courts shall have the authority to do so."

SIR JAMES LUKIN ROBINSON, Bart., of Toronto, whose death occurred recently in the seventy-seventh year of his age, was the eldest son of Sir John Beverley Robinson, for many years Chief Justice of Upper Canada, and President of the Court of Appeal. He was born in 1818, and was called to the Bar at the Middle Temple in 1843.

# THE LEGAL NEWS.

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VOL. XVII.

OCTOBER 1, 1894.

No. 19.

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## *CURRENT TOPICS.*

The September appeal list at Montreal, showed considerable activity in the inscription of new cases, no less than 33 having been added since the appearance of the May list. The September total was 64, an increase of 8 over the May list. Apparently, however, the September term follows too closely on the vacation, or the vacation terminates too soon, for there was a remarkable unreadiness on the part of counsel. After the entire list had been called over more than once, and several adjournments had been made at an earlier hour than usual, the Court was forced to rise on the 22nd September, five days before the end of the term, only 16 of the 64 cases having been heard. Of course, in many of these cases there is a considerable amount of evidence to be copied and printed, and the preparation of the factums is thereby delayed, the result being that the argument of the case is postponed to a later term. But making every allowance for this obstacle, the total of cases continued to next term—48 out of 64—seems unduly large, especially when we recall the public complaints of delay in the Court of Appeal, and the eagerness which used to be displayed to have cases declared privileged and accorded precedence.

Some of the provisions of the "Notice of Accidents Act," passed in England last session, are interesting. Where in any employment specified in the schedule to the Act an accident occurs which causes to any person employed therein either loss of life or such bodily injury as to prevent him, on any one of the three working days next after the occurrence of the accident, from being employed for five hours on his ordinary work, his employer shall, as soon as possible, and, in case of an accident not resulting in death, not later than six days after the occurrence of the accident, send to the Board of Trade notice in writing of the accident, specifying the time and place of its occurrence, its probable cause, the name and residence of any person killed or injured, the work on which any such person was employed at the time of the accident, and, in the case of an injury, the nature of the injury. If any person wilfully makes default in complying with these requirements of the Act he is liable on summary conviction to a fine of 40s. Power is also conferred upon the Board of Trade to hold formal investigations in cases of serious accidents.

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These are days of record-breaking in various lines of activity, and there seems to be a tendency to get out the watch to measure the pace of judicial work. Thus it is prominently stated of one learned judge sitting in London in vacation, that "he rose for the day at half-past one, having heard more than thirty-five applications in three hours. He sat in chambers at half-past ten, and, before going into Court at eleven o'clock, disposed of eleven summonses." On another day the same judge disposed of over twenty cases by two o'clock. But even this is exceeded by another judge whose exploits are duly noted. Dispatch and celerity are excellent qualities, and some men by reason of their mental constitution may achieve marvellous tasks without any risk of committing errors.

But it would be matter for regret if the bar or the judges generally began to measure judicial proficiency by the progress of the clock.

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The question of sons practising before their fathers is one which we have heard discussed very frequently in this province during the last thirty-five years. The objection often seems to have considerable force in a country where there is no distinction between barristers and attorneys, and where a counsel who is also attorney of record may have an interest in the costs. A recent issue of the *London Law Journal* refers to the same subject. "The time-honoured question," it says, "whether a barrister is entitled to practise before his father has again been raised—this time in the House of Commons—but without any satisfactory result. Mr. Asquith was asked whether there was any rule to prevent barristers whose fathers are chairmen of quarter sessions from practising at such sessions, and his answer was in the negative. The question whether such a rule ought not to exist might advantageously occupy the attention of the General Council of the Bar; for it is derogatory to the dignity of justice and injurious to the interests of the profession that the practice that prevails in certain quarters should be allowed to continue. No general rule could be framed to prevent a barrister from appearing in a professional capacity before his father. A large number of judges of the High Court have sons at the Bar, with whom it would be manifestly unjust to interfere. The evil lies in a barrister localising and practising regularly in a Court always presided over by his father; and it ought not to be difficult for the representative body of the Bar to put an end to this."

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*The Chicago Legal News* has some pleasant words about the Chief Justice of the United States. "Chief Justice Melville W. Fuller," says our contemporary, "spent several

days of the past week in this city, for so many years his home and the scene of his triumphs at the bar. It is here he is known best and loved most by his professional brethren of all parties. Is there any more honorable position in the world than Chief Justice of the Supreme Court of the United States? Chief Justice Fuller does not magnify his office. He is the same pleasant, social gentleman he was when at the bar, and greets a friend as kindly as of yore. Chicago is justly proud that she has furnished the Chief Justice to the Nation, but more so that she has furnished such a Chief Justice as Melville W. Fuller makes."

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#### PAYMENT BY CHECK.

We really see and handle but little of our money. We pay our larger bills by check, and conversely debts are paid to us by checks which we pass through our banking accounts. It is consequently of some importance that we should know when we may pay by check, and when, if we are acting for others, we are justified in accepting a check instead of cash. When acting for ourselves we can insist on our strict rights and refuse a debtor's check, if we do not mind the inconvenience of the cash. We have heard of the case of a solicitor declining to accept the check of some other solicitor, and of the latter arriving in a cab with thousands of pounds sterling in bags, much to the horror of the creditor solicitor, who had hoped to have received bank-notes, and now had the labor of counting out the gold.

When payment is accepted by check, bill of exchange, or promissory note, it "may be absolute or conditional, the strong presumption being in favor of conditional payment." (Chalmers's Bills of Exchange, 4th ed., p. 305.) The meaning of "conditional" is that it will be treated as payment only if honored; if dishonored the debt revives. A person who accepts a check instead of cash in payment of a debt due to himself has a perfect right to run the risk of its being dishonored and the debtor's having disappeared, but when the acceptor is only an agent, a question of his liability to his principal arises. In some cases a check is recognized as a proper form of payment. For instance, in *Farrer v. Lacy, Hartland & Co.*, 53 L. T. Rep. N. S.

515; 31 Ch. Div. 42, the Court of Appeal decided that the custom of auctioneers to accept checks, instead of cash, in payment of deposits on sales, is reasonable. "If," said Lord Justice Baggallay, "persons intending to purchase property were compelled to go with all the cash in their pockets, it would be almost impossible to conduct large sales by auction." "Mr. Lock," said Lord Bowen (then Lord Justice), "referred us to the well-known proposition that an agent to receive money must not take payment by check. It is an identical proposition that an agent to receive a bird in the hand must not accept a bird in the bush. The question is whether the conduct of the plaintiff was reasonable in the case of a person who was acting in the interests of another. Is it an unreasonable practice—to say nothing of custom—to allow the auctioneer to take a check, when that practice is adopted in ninety cases out of a hundred?"

But though an agent in the ordinary course of business may receive a check in payment, "the law being that a person who owes money to an agent, knowing him to be an agent, must pay in such a manner as to facilitate the agent in transmitting the money so paid to him to the principal,"—Evans on Principal and Agent, 2d ed., p. 136,—he cannot do so in all cases. In *Papé v. Westacott*, 70 L. T. Rep. N. S. 18; (1894) 1 Q. B. 272, a house agent was instructed by the landlord not to hand over to the tenant a license to assign until the latter had paid his arrears of rent. The tenant gave the agent a check for the arrears and the agent's charges, and in return received the license, but the check was dishonored, and the tenant had disappeared. It was held by the Court of Appeal that there was no such custom as would authorize the acceptance of a check by the house agent in such a case, and that he was liable to his principal for the amount of the arrears. In commercial transactions customary methods must be sanctioned, or business would come to a standstill, but in this case it is evident that the agent was, to employ Lord Bowen's expressive simile, accepting a bird in the bush instead of one in the hand, and one that must have appeared likely to fly away, since he had allowed his rent to be in arrear. At any rate an agent who does accept a check should accept one which he can immediately transmit to his principal, and not one which has to be paid into his own account first, owing to the fact that the sum payable under it is for money owing to him as well as for that payable to his principal. In *Bridges v. Garrett* (22 L. T. Rep. N. S.

448; L. Rep. 5 C. P. 451), however, the Court of Exchequer Chamber justified the finding of a jury that a check paid into the agent's banking account was payment to the principal under the following circumstances: The steward of a manor appointed the defendant's attorney as deputy steward to take the defendant's admittance. The defendant subsequently gave the attorney a crossed check for the fine and the steward's and attorney's fees. The check was duly honored by the defendant, and the money credited to the attorney's banking account, but, the attorney's balance being against him, his bankers refused to pay him the money. The court thought that the jury might have come to an opposite conclusion, but that there was sufficient evidence to entitle the jury to find that the copyholder had in paying the deputy steward paid the lord his fine. It is obvious that in that case, cash might have shared the same fate as the check, for, if it had been paid into the deputy steward's account, it would have been stopped by the bank and never have reached the lord of the manor.—*Law Times*.

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### PUNCTUATION AND THE LAW.

From time to time it is announced in correspondence from Washington D. C., that the punctuation of acts passed by Congress is defective, and the legal advisers of the government are called upon to settle the knotty questions arising from these errors. Several instances of defective punctuation have been noted in the new Tariff Act, and similar errors occurred in the wording of the Tariff Act of 1890. None of the errors can be corrected without a joint resolution of the two houses, for the "law print" of the bill must be an exact copy, wording, spelling, punctuation and everything else contained in the enrolled bill, which is the copy that becomes a part of the archives of the government.

It is unfortunately too true that now, as in the time of Chaucer,

A reader that pointeth ill

A good sentence may oft spill.

Those who have tried by means of the law courts to take advantage of erroneous punctuation have had their trouble and bills of costs for their pains, and it may be said that a similar fate awaits the person who may endeavor to defeat by legal means the manifest intent of the law. One of the oldest legal maxims, as old as the law itself, is to the effect that bad grammar does not vitiate a

deed (*mala grammatica non vitiat chartam*), and in the eye of the law the same principle applies in the case of bad or wrong punctuation. As the late George Perkins Marsh, LL. D., long representative of the United States at the court of Italy, says in one of his lectures on the English language, delivered at Columbia College and afterward published in book form: "Mistakes in the use of points, as of all the elements of language written and spoken, are frequent; so much so, in fact, that in the construction of private contracts, and even of statutes, judicial tribunals do not much regard punctuation; and some eminent jurists have thought that legislative enactments and public documents should be without it."

Bishop, in his "Commentaries on Written Laws and Their Interpretation," says: "The statutes in England are not punctuated in the original rolls: but more or less marks of punctuation appear in them as printed by authority. With us the punctuation is the work of the draughtsman, the engrosser or the printer. In the legislative body the bill is read so that the ear, not the eye, takes cognizance of it. Therefore, the punctuation is not, in either country, of controlling effect in the interpretation."

Punctuation, in fact, forms no part of the law, as pointed out in the foregoing extract—a fact well recognized in Great Britain as may be observed in legal advertisements for next of kin, and often reprinted in the leading daily papers here, which are noticeable for their want of punctuation. Some of the cases in the United States in which the above cited principle has been laid down are *Doe v. Martin*, 4 T. R. 65; *Barrow v. Wadkin*, 24 Bean, 326; *Cushing v. Worrick*, 9 Gray (Mass.), 385, and *Gyger's Estate*, 65 Penn. Stat. 311. Those interested may also consult Sedgwick on "Statute Law" for further information on this subject.

Punctuation cannot have a controlling effect, but may be disregarded altogether when plainly contrary to the legislative intent, in which case the courts will repunctuate to give effect to such intent, as decided in the *United States v. Isham*, 17 Wall. (U. S.), 502, *Albright v. Payne*, 43 Ohio St. 15, and in *Pancoast v. Ruffin*, 1 Ohio, 385.

The following extracts are from some of the decisions of the courts on this interesting question:

"Punctuation is a most fallible standard by which to interpret a writing; it may be resorted to when all other means fail." *Ewing v. Burnet*, 11 Pet. (U. S.), 54.

"Punctuation is no part of the statute." *Hammock v. Farmer's Trust and Loan Company*, 105 U. S. 71.

"For the purpose of arriving at the true meaning of a statute, courts read with such stops as are manifestly required." *United States v. Lacher*, 134 U. S. 624, opinion given by Chief Justice Melville Fuller.

"Punctuation in written contracts may sometimes shed light upon the meaning of parties, but it must never be allowed to overturn what seems the plain meaning of the whole contract." *Osborn v. Farwell*, 87 Ill. 89.

"Punctuation may perhaps be resorted to when no other means can be found of solving an ambiguity, but not in cases where no real ambiguity exists except what the punctuation itself creates." *Weatherly v. Mister*, 39 Md. 620.

"The want of proper punctuation is, if objectionable at all, no more allowable in vitiating the contract or destroying its effects than bad grammar, the rule against which is a maxim of the law." *White v. Smith*, 33 Penn. St. 186.

From the writings of the authorities cited, and from the foregoing extracts from decisions, it will be gathered that there is no hope for any litigants who may base their cases solely upon the erroneous punctuation of the acts passed by Congress.—*American Bookmaker*.

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### FRENCH AND ENGLISH LEGAL PROCEDURE CONTRASTED.

The first thing that strikes one in comparing foreign with English lawyers is the marked difference between our barristers and French *avocats*, and English solicitors and French *avoués*. In common conversation they are respectively treated as identical, whereas they are by no means so in fact. In England a solicitor demands payment, issues and serves process, delivers statements of claim and defence, instructs the barrister to appear in Court, and, dispensing with the latter immediately after the trial, concludes the work by entering up judgment and enforcing it, either through the sheriff's officer or by bankruptcy measures. An English barrister, with rare exceptions, only moves when the solicitor sets him in motion. On the other hand, in France or Belgium the *avocat* is sometimes consulted first, leaving him to select the *avoué*, the latter's services being limited substantially to

exchanging pleadings (there called 'conclusions'), after which the *avoué* retires to the background pretty much as our barristers leave the case as soon as the Court or jury gives its verdict.

Everybody here is, of course, aware that, besides the already adverted to functions of an English solicitor, he has the preparation of testamentary documents and deeds of conveyance of property, and other innumerable duties involved in advising clients (many of which duties are much better performed by the aid of common-sense than by a knowledge of common law), whereas on the Continent these united offices are divided among a number of different people.

In England a man unconnected with the law who demands payment and threatens legal proceedings commits a statutory offence, such duty being the absolute privilege of a solicitor. The person who does this in France is the *agent d'affaires*, who, in the general way, has no pretence to be, and does not affect to be, a lawyer; and he can and does perform all the work of negotiation connected with enforcing a claim. In Belgium the *agent d'affaires* is very little known; there *avocats* often make preliminary demands for payment—a step which would be a breach of etiquette in Paris. The *avoué* does not come upon the scene even after the demand for payment; for the man who has to be instructed to issue and serve process is a quasi-official person called the *huissier*, who alone has the privilege of attending to this work, and who commonly quits the scene when he has served the equivalent to our writ and officially recorded the fact. It is true that some *huissiers* carry on the joint business of *agent d'affaires*, and sometimes act in Court, but, as I have said, the function of *huissier* is the subject of official appointment. It is when, and when only, the defendant shows signs of defending that the *avoué* comes into play.

I may mention that a defendant cannot act in person in a French Civil Court (I will speak of the Commercial Division later), though he may appear as his own advocate when once professionally represented. His *avoué* deals with the pleadings, the latter, as before stated, usually retiring immediately that operation is concluded, the *agent d'affaires* instructing the *avocat*, who alone has professional audience in civil, as contra-distinguished from mercantile, tribunals. After the trial is over the *agent d'affaires* resumes his sway, the *huissier* being again called in for the purposes of execution.

An important contrast between the English and French systems is the almost practical exclusion of oral evidence. In the first instance written materials alone are dealt with (each party having to exchange papers relied on beforehand), and it is only when some positive denial of the genuineness of the document arises that verbal evidence is allowed, and even then there is no examination or cross-examination of the witnesses, except by the judge himself. There are no juries in civil cases; but, as several judges sit at a time, they, in a sense, constitute a sort of jury. Documents are admitted much more freely on the Continent than with us, and in this respect I think the foreign system has some advantage over ours. Every English solicitor knows that by the rule recently promulgated the strictness of proof of documentary evidence has been usefully relaxed here, and we might perhaps go farther; but I do not think that we should be prepared to adopt the foreign regulation wholesale, which in many cases is very loose, and leads to rather rough justice.

The next striking contrast between English and French practice is in the number of judges. While the population of France is only some 50 per cent. over England, the judges are at least ten times as many.

In round figures, the number of persons in England having any pretence to the title of judge of a Civil Court does not exceed a hundred, taking the County Court, the several other minor Courts, such as the Mayor's Court, London, the Northern Palatine, and and other local Courts of record, and so on up to the Supreme Court and the House of Lords. In France there are at least a thousand judges.

Under the French system there is no High Court as understood here. We are all aware that a common writ may be issued for service at Land's End or Berwick, whereas legal process cannot, except under special circumstances, be instituted in Paris against a man domiciled at Marseilles or Calais. In this sense the whole of France is divided somewhat like our English County Courts, the French metropolis itself being only provided with what is equivalent to a central County Court. In France there is this further distinction, that the Court of Appeal for all these French districts is local—i.e. situated in the chief town of each group of districts—about equivalent to what would happen if we had a 'Divisional' Court sitting in every English county town. For most purposes these numerous Courts of Appeal are

final, the only higher tribunal in France being the Cour de Cassation, which, as the words imply, is not a Court of Appeal, but a tribunal capable only of quashing previous decisions, and on points of law only, with no power to vary or adjust. This Court, if it differ, simply says that the Court below has gone wrong, without possessing machinery for putting it right; in short, the parties have to start afresh, and for these reasons the Cour de Cassation (the only Court in France which permanently holds its sittings in Paris) is less resorted to than it otherwise would be.

I may notice one rather important matter of practice in France. In all the Courts at the opening hour the entire list is called, and the advocates answer (there are no leaders and juniors in our sense of the word), by which means adjournments are often arranged where required and some approach to the possible length of a case can be arrived at, not to speak of friendly arrangements being often achieved by the parties being brought together thus early. I think we might usefully adopt some such plan here. There is often a good deal of reserve removed when counsel once meet face to face; moreover, it is a great convenience to the judges to get to know where the weak and the strong cases lie. I ought to state that, theoretically, the judges abroad are supposed to try and conciliate the parties before actual trial, but except where the litigants appear in person this theory falls short of practice.

I stated in a previous paper that the number of solicitors in France (it is somewhat different in Belgium) is limited for each district. As a rule, a solicitor or barrister admitted to practise in the Court below has no audience in the Courts above, and *vice versa*; so that one has to change one's *avoué* and *avocat* at each move. This accounts for the comparatively isolated concern of the *avoué*—the *agent d'affaires* (who, as I have said, is not a lawyer at all) being mostly the only man in touch with the client from the beginning to the end. In France and Belgium a solicitor cannot of his own accord set up in business. A man may undergo the needful legal examination, but he can no more practise than a person in England can be a member of Parliament unless somebody dies, or retires, so as to create a vacancy. Law partnerships are absolutely unknown.

The fees of *avoués* are not large, but that body being limited in number, the aggregate income earned is good. In point of fact, an *avoué* is more like one of our old 'pleaders' than an English

solicitor. Having regard to the very limited duties they perform, and to the mechanical character of the work coming ordinarily within their province, their office appears to be of a comparatively unimportant character, and but for the vested interests involved it is difficult to see what separate functions they carry out which could not equally well be blended elsewhere, just as our pleaders have been superseded.

It was said of a well-known deceased English solicitor, whose practice was mainly confined to criminal Courts, that he was the only one amongst us who kept no books and drew the whole of his costs beforehand (a natural precaution, perhaps, with clients who were mostly hanged or transported); but it is the regular practice to this hour in France for the *avoué* to name his *honoraires* in advance and to receive cash down. He may be guided to some extent by the knowledge that a client more readily pays while indulging in the pleasures of hope, but the reason, no doubt, mainly lies in the explanation already given, that the taxable fees recoverable from the other side are so infinitesimal that, as far as the solicitor is concerned, there is little to hope for in this direction.

As to costs generally, I consider that the French system contrasts disadvantageously with ours, as I share the views of modern reformers, who think that the wrongdoer should bear the expense attendant on his own default, and that the recent efforts made in England to throw the whole of the properly incurred costs upon him, instead of a limited portion, is a step in the right direction.

The payments to *avocats* are much less in France than in England. In a recent English case the leader's brief was marked with a fee of 1,000 guineas. This is not altogether uncommon in heavy cases here, but although I know of one action in France where a barrister received 30,000 francs (*avocats* are not too modest to suggest their own fees, and they try for an *ad valorem*), the ordinary scale is low. The average smallness of such fees abroad may not be entirely disconnected with the fact that the winning party is unable to make his adversary pay a single sou towards them!

Judicial salaries in France are in keeping with counsel's fees, the emoluments of the president of the highest Court of Appeal which is the single Court having jurisdiction over all France, being only the same as that of an English County Court judge.

Fifteen hundred sterling, when magnified into a trifle short of 40,000 francs, seems a large official remuneration in a Frenchman's eyes. Judges in France are altogether different from our judges. Here they are promoted from the front rank of the Bar; there it is quite otherwise, and, to my mind, our system compares very favourably in this respect. I may mention, in passing, that the judges of the Commercial Tribunal in France are picked mercantile men, acting without salary, being satisfied with the honour conferred upon them by the votes of their mercantile *confrères*, all such posts being the subject of election under carefully prescribed rules.

Perhaps on the whole the most important contrast between French legal procedure and our own arises from the civil business being divided into commercial and non-commercial. There are distinct tribunals in every place in France, with a few unimportant exceptions. I am one of those who have always advocated a similar division in this country, after arriving at the issue to be tried (if not from the actual issuing of the writ), and I was pleased to be able to successfully pioneer a resolution on this subject at our Plymouth meeting in 1891. The council used its unstinted influence to realise the expressed desire of the profession conveyed at that meeting, and it is gratifying to find that the judges have now formulated a scheme under which we are shortly to have a separate Court for the trial of mercantile disputes. We shall all watch with interest the official rules, expected to be issued after the Long Vacation, to carry out the announced judicial experiment.

I was aware that I had to encounter doubts when I read my Plymouth paper. At the outset of the debate there I went so far as to suggest even three divisions—one for mercantile cases, another devoted entirely to libel, slander, malicious prosecution, etc., leaving miscellaneous causes of action to be put into a third list, so as to still further define and maintain the proposed isolation of the commercial division. I myself never could understand why the comparatively simple issues of law and fact arising out of mercantile transactions should be mixed up for trial with what one may call the sensational list. I cannot conceive anything more repelling to the city merchant than to find that a question turning upon the judicial construction of a strictly commercial contract must be sandwiched between such trials as, say, the *Baccarat Case*, or that of the *Missing Pearls*. It may or

may not be too late to resuscitate our old commercial lists, other agencies having been at work to diminish them, but one may, I think, hope that the dispatch and certainty likely to be the outcome of the new proposal will, after a reasonable lapse of time to enable the change to become known, insure more or less revival of Queen's Bench mercantile lists. I know that many members of our profession have hesitated to lend encouragement to the severance, on the plea that it is difficult to define commercial and non-commercial business, but in this respect I heartily commend the distinction drawn in France as a sound basis for action. In a foot note <sup>1</sup> I give substantially a list of causes treated in France as commercial, but for the purposes of to-day they may be spoken of as disputes between traders in relation to goods or services (excluding debt collecting from retail customers, unless the debtor has given an acceptance), litigation arising on all negotiable instruments, or out of banking or suchlike transactions, and, finally, Bankruptcy and Admiralty.

It is, perhaps, not strictly germane to this paper to touch upon what are known as chambers of arbitration here and there recently established in England; but as I happened at Manchester to act as the mouthpiece of my colleagues, and in various Press notices the attitude was seemingly misunderstood, it is as well to contrast the actual procedure in the French Tribunal de Commerce with that contemplated by these English chambers, especially as some of my respected friends schooled themselves into the belief that there was some analogy between the two ideas. In France, and also in Belgium, if A contracts with B to supply him goods to sample to resell, and B alleges default, he sues A in the commercial division, and procures a more or less speedy trial in a public Court of justice permanent in its character, with Government power behind it to peremptorily enforce its decrees. Among other advantages of this Court is that a special day is set apart for the hearing of cases arising out of negotiable instruments—a practice, I hope, that we shall adopt here; for I have

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<sup>1</sup> Disputes arising out of contracts between merchants, bankers, or partners—Sales of produce or goods for re-sale or hire—Agreements for manufacture or carriage of goods—Sales by auction—Contracts for commissions—Transactions arising out of bills of exchange or remittances of money—Contracts to build or purchase vessels, or for the supply of rigging or stores—Charterparties, insurance, and other contracts concerning maritime commerce—Agreements for pay of crews, engagements of seamen for the merchant service, and all contracts between traders and their employés in relation to business.

never ceased expressing my regret that the Bills of Exchange Summary Procedure Act was undercut in this country on the allegation that Order XIV replaced it—obviously not the case, as the onus of an affidavit was shifted from the debtor to the creditor—a material difference. I myself am a member of the London Chamber of Commerce, and I confess that I welcomed the idea of giving a trial to this scheme of arbitration, which had the benefit of highly-reputed sponsors. I may say personally that I should have preferred to have seen it, if possible, tacked on to the jurisdiction of that useful institution, the Mayor's Court. When it accidentally fell to my lot to state publicly that the Council of the Incorporated Law Society could not see their way to officially recommend the profession to father the chamber (a very different matter from individual adherence), the two positions taken up by me were so distinct and yet reconcilable, that I did not anticipate any misapprehension would arise. I am not concerned to-day in justifying the course taken at Manchester, but if any evidence were required of the foresight of the decision of the executive of our society to remain passive, it is to be found in the *coup de grâce* contained in a recent leading article in the *Times*, undoing its powerful support to the venture when launched, and favourably advocating the new scheme propounded by the judges themselves for dealing with the commercial legal business of the country.

To return to the more immediate object of my paper, I have already drawn attention to several points upon which I submit that foreign procedure may be contrasted advantageously with our own. In many respects, especially in regard to delay, we are better off than our neighbours. The Long Vacation is practically from August 1 to September 30 (a better interval to my mind, enabling one here to avoid the conflict of Bank Holiday), but adjournments at all times are granted on the most flimsy pretexts, and procrastination is occasionally insufferable. I think that in the comprehensiveness of the labours of an English solicitor (and the continuous hold which the Court has over him) we are far ahead of our friends across the Channel; but I certainly feel justified in suggesting that we may borrow some useful hints in commercial cases from a practice based upon the Code Napoléon, which has been in operation in many places on the Continent for the best part of a century.—*Francis K. Munton in Law Journal* (London).

*THE STOP WATCH SYSTEM.*

Some time ago, Mr. James T. Carter, of the New York Bar, was asked to argue the elevated railroad cases before the Supreme Court. A number of distinguished counsel were engaged on one side or the other of the case. Mr. Carter may perhaps be said to approach as nearly as it is possible for any one man, to the position of leader of the American Bar. After the argument was over, during a conversation, he is reported to have made a statement substantially as follows: "I have had the pleasure of listening to a number of the leaders of your Bar in argument before the Supreme Court, and, if I may be permitted to say so, what has most struck me has been the breathless haste manifested in their style of argument." To this one of the aforesaid leaders replied: "Well, Mr. Carter, you are not accustomed to the discipline which brings you under the wire in obedience to a stop watch."

In connection with this subject the following appears in Judge Dillon's work, entitled "Our Law in its Old and New Home, 1894." "It must be admitted that the temptation to apply the 'Stop Watch doctrine' must be very strong. Scores of cases go up on appeal that either have no merit or which have been fully and fairly considered below; cases which involve no new principle, and which turn on mere horn book law. The trifling cost of taking a case up, the fact that appellant does not even have to pay for printing of the paper books of appellee, whom he has dragged into litigation, with several other considerations, all have a tendency to provoke improvident appeals. Parties will gamble on the chances when they can do so without responsibility for the costs of the game. For the bulk of these cases the half hour limit is abundant."

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**LEGAL ANTIQUITIES.**—Bishop Burnet relates a curious circumstance respecting the origin of that important statute, the Habeas Corpus Act. 'It was carried,' he says, 'by an odd artifice in the House of Lords. Lord Grey and Lord Norris were named to be the tellers. Lord Norris was not at all times attentive to what he was doing; so a very fat lord coming in, Lord Grey counted him for ten, as a jest at first; but seeing Lord Norris had not observed it, he went on with this mis-reckoning of *ten*; so it was reported to the House, and declared that they who were for the bill were the majority, and by this means the bill passed.'—*Green Bag*.

Probate duty was paid on £57,085, as the value of the personal estate of the late Lord Hannen, who died on the 29th of March last.

# THE LEGAL NEWS.

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VOL. XVII.

OCTOBER 15, 1894.

No. 20.

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## *CURRENT TOPICS AND CASES.*

The name of Meredith is so honored in our judicial annals that it is with special pleasure we learn that a gentleman bearing it and a near relative of the late Sir William Meredith, once more holds the office of Chief Justice of a high Canadian Court. Sir Thomas Galt, Chief Justice of the Common Pleas, Ontario, having retired from the Bench after twenty-five years' service, Mr. William Ralph Meredith, Q. C., a gentleman of the highest order of ability and greatly esteemed by his professional brethren, has been appointed to the vacant position. This nomination has given great satisfaction in Ontario, and there can be no doubt that Mr. Meredith will acquit himself in his judicial capacity as admirably as he has done at the bar and in the legislature.

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Verdicts of juries are not often set aside on the ground of inadequacy of the amounts awarded—particularly in actions of damages against civic corporations. Our Code of Civil Procedure (art. 426) has, indeed, expressly provided for such a case: "The Court may grant a new trial, (11) if the amount awarded *be so small or so excessive*

that it is evident that the jurors must have been influenced by improper motives, or led into error." Such a case has occurred at Toronto—*Church v. City of Ottawa*—where a verdict for \$700 in favor of a physician who was seriously injured by stepping into a hole in the street, was set aside by the Court as inadequate, and a new trial ordered.

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Chief Justice Howe, of Wyoming, who, it is stated, was the first judge to hold court with women as jurors, admits that at first he entertained certain prejudices against the policy of the law, but nevertheless bears testimony to the capacity of those who have served in his court. He says they were careful, painstaking, intelligent, and conscientious. They were firm and resolute for the right as established by the law and the testimony. Their verdicts were right, and after three or four criminal trials the lawyers engaged in defending persons accused of crime began to avail themselves of the right of peremptory challenge to get rid of female jurors, who were too much in favour of enforcing the laws and punishing crime to suit the interests of their clients. After the grand jury had been in session two days, the dance-house keepers, gamblers, and *demi-monde* fled out of the city in dismay, to escape the indictment of women grand jurors. In fact, he adds, I have never in my twenty-five years of constant experience in the courts of the country seen more faithful, intelligent and resolutely honest grand and *petit* jurors than these.

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The magnitude of the "unconsidered trifles,"—unclaimed dividends and the like—in England, is evidence not merely of vast accumulations of wealth but of the vicissitudes of life as well. Thus, dividends on government stocks due and not demanded on 1st April, 1893, were £353,167; on 3rd July, 1893, £326,414; on 3rd October,

1893, £389,668; on 3rd January, 1894, £322,529. The total amount of accumulated unclaimed stock and dividends is over twenty-five million dollars. The funds in Chancery amount to over sixty-five million pounds sterling. The sum of £69,032 was received by the Crown during the past year from intestates' estates in the absence of heirs or from lapsed legacies, etc. There is £79,049 of unclaimed army prize money, £119,608 of unclaimed balances due to soldiers' kin, and £212,979 of unclaimed naval prize money due to sailors or their representatives. Joint stock banks, it seems, are not yet required to make returns of unclaimed deposits, the amount of which must be very large. It would appear that although the world is small, and particularly that part of it to which the above figures apply, inheritances in various ways are apt to miss non-expectant or absent heirs. The crowding of people in vast cities, and perhaps, too, the similarity of names, may account to some extent for the large sums which remain unclaimed. The necessity for the publication of an annual official return of all unclaimed moneys in government departments is self-evident, but the want has not yet been supplied.

#### RECENT ONTARIO DECISIONS.

##### *Will—Forfeiture—Felony.*

Where a devisee kills the testatrix and is convicted of manslaughter, he does not forfeit the devise, the element of intent being in such case necessarily absent.

*Cleaver v. Mutual Reserve Life Fund Association*, (1892) 1 Q.B., 147, distinguished.

Judgment of Ferguson, J., 24 O. R. 132, reversed.—*McKinnon v. Lundy*, Court of Appeal, 11 Sept., 1894.

##### *Damages—Inadequacy of amount found by jury—Right of Court to interfere—New trial.*

Notwithstanding that it is unusual for a Court to interfere with a verdict of a jury on the ground of the inadequacy of the amount

of damages found, still such verdicts are subject to the supervision of a court of first instance, and, if necessary, of the Court of Appeal, and if the amount awarded be so small or so excessive that it is evident that the jury must have been influenced by improper motives or led into error, then a new trial must be granted.

*Held*, on the evidence in this case, where a practising physician had been badly, and perhaps permanently, injured by stepping into a hole in one of the streets of the corporation defendant, and his professional business also injured, that \$700 was not enough; and a new trial was ordered.—*Church v. City of Ottawa*. Chancery Division, 30 June, 1894.

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*Criminal law—Criminal Code, s. 308—Fraud—Receiving money on terms.*

Crown case reserved. Indictment and conviction of the defendant, under s. 308 of the Criminal Code, for receiving from one Snelgrove \$338.46, the property of one Scott, on terms requiring the defendant to account for it or pay it over to Scott, and, instead thereof, fraudulently converting it to his own use.

*W. R. Riddell*, for the defendant, contended that as no terms were imposed by Snelgrove, there was no offence under the Code.

*J. R. Cartwright, Q.C.*, for the Crown, was not called upon.

The Court held that the section does not mean "terms imposed by the person paying the money," but "terms on which the defendant, when he receives it, holds it."

Conviction affirmed.—*Regina v. Unger*, Queen's Bench Division, 31 May, 1894.

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*Libel—Incorporated company—Publishers of newspaper—Charge of corruption—Injury to business—Special damage.*

The plaintiffs were a company incorporated for the purpose of publishing a newspaper. The defendant wrote and published statements that the plaintiffs' newspaper reported favorably or adversely at ten cents a line, and that it was corrupt and prostitute.

*Held*, that a jury might well find that these statements imported the charge that the plaintiffs were in the habit of selling

the advocacy of their newspaper, and that such a charge tended to bring them into contempt and to injure their business, and was therefore a libel.

A corporation such as the plaintiffs can maintain an action of libel in respect of a charge of corruption, affecting their business, without alleging special damage.

*Metropolitan Saloon Omnibus Co. v. Hawkins*, 4 H. & N. 87, commented on and distinguished.—*South Hatton Coal Co. v. North-Eastern News Association*, (1894) 1 Q. B. 133, followed.—*Journal Printing Company of Ottawa v. McLean*, Queen's Bench Division, 8 June, 1894.

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*Evidence—Criminal Code*, 1892, ss. 584, 843—*Appeal to Sessions—Subpœna to witnesses in another province.*

Under the provisions of ss. 584 and 843 of the Criminal Code, 1892, it is competent for a judge of the High Court or County Court to make an order for the issue of a subpœna to witnesses in another province to compel their attendance upon an appeal to the General Sessions from the action of justices of the peace under ss. 879 and 881.—*Regina v. Gillespie*, In Chambers, Boyd, C., 2 June, 1894.

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*Railways—Carriers—Warehousemen.*

When a shipper stores goods from time to time in a railway warehouse, loading a car when a car load is ready, the responsibility of the railway company in respect of such of the goods as have not been specifically set apart for shipment is not that of carriers but of warehousemen, and in case of their accidental destruction by fire the shipper has no remedy against the company.

Judgment of the Common Pleas Division, 23 O. R. 454, reversed.—*Milloy v. Grand Trunk Railway Company*, Court of Appeal, 30 June, 1894.

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*Negligence—Nuisance—Highway—Damages—Overhanging cornice.*

The owner of a building, from which a cornice overhanging the sidewalk falls, because the nails fastening it to the building have become loosened by ordinary decay, and injures a passer-by, is liable in damages without proof of knowledge on his part of the dangerous condition of the cornice, the defect being one that could have been ascertained by him by reasonable inspection.—*Roberts v. Mitchell*, Court of Appeal, 30 June, 1894.

*Summary conviction—By-law against swearing in street or public place—Private office in government building.*

A city by-law enacted that no person should make use of any profane swearing, obscene, blasphemous, or grossly insulting language, or be guilty of any other immorality or indecency, in any street or public place. Under it the defendant was summarily convicted of an offence committed in his private office in the customs house, a government building.

*Held*, that the object of the by-law was to prevent an injury to public morals, and applied to a street, or a public place *ejusdem generis* with a street, and not to the place in question; and the conviction was quashed.—*Regina v. Bell*, Common Pleas Division, 25 May, 1894.

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*Arbitration and award—Reference to three arbitrators—Award by two—Invalidity—Private authority.*

It is a general rule, applicable to all cases of private authority, trust or reference, to be exercised by several persons, that unless the constituent instrument permits action or decision by a majority, the office is regarded as joint, and all must act collectively. Different considerations arise when the duties are of a public nature, but in transactions between individuals they make their bargain and so become a law unto themselves. And where a submission to arbitration provided that the award should be made by three arbitrators, an award by two of them the other dissenting, was set aside on summary application.—*In re O'Connor & Fielder*, Queen's Bench Division, 13 Oct., 1894.

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*Criminal law—Conspiracy—Failure to complete fraud—Indictment of one of two conspirators.*

A conspiracy to defraud is indictable, even though the conspirators are unsuccessful in carrying out the fraud. One of two conspirators can be tried on an indictment against him alone charging him with conspiring with another to defraud, etc., the other conspirator being known in the country.—*Regina v. Frawley*, Common Pleas Division, 23 June, 1894.

## LAW DICTIONARIES.

This is a subject of interest to more than the book-lover. Mr. W. C. Anderson, in the *American Law Review*, has collected a great deal of valuable information, from which it appears that since 1607 there have been published in England at least twenty-nine, and in the United States at least thirteen, law dictionaries; twenty-one since 1839. That designation includes law lexicons, law glossaries, law vocabularies, and the more recent title, dictionary of law. Several of the productions have been described as 'legal,' 'judicial,' and 'juridical,' and one was said to contain only 'adjudged' words and phrases. The precise difference in the ideas intended to be conveyed by these titles has not been made clear. Nearly all the books treat of substantially the same matters: single words, phrases, maxims, statements of principles and rules; all really or supposedly of a legal character.

The best of these dictionaries in each generation, says Mr. Anderson, have indicated the advances made in juristic science. They, perhaps more fully than any other publication, have recorded the evolution of legal notions, for they not only concern themselves with legal terminology, but they note applications of legal principles; they register definitions, and exhibit enunciations; they state 'rules of action,' as well as collate 'signs of ideas.' Thus, those which have been recognized as the completest works have combined the two-fold function of the word-book and the book of institutes; in this regard corresponding to the lines upon which the vernacular dictionaries have been advancing.

Between the older and a few of the later dictionaries, observes the same writer, the differences which are noticeable upon a cursory examination, as was to be expected, correspond with the legal notions dominant in their respective periods. The most comprehensive of the modern works exhibit society as having made long strides forward in the recognition and administration of justice, and as having not only outgrown old notions, but as having neither scholastic nor practical use for the dialectic or local terms in which transitory notions of early ages were expressed. As requirements of positive law and of the practice by which that law was made effective, under changing sentiment relaxed, were tolerated, and finally were supplanted; so, inevitably, legal phraseology lost its hold and passed into obsolescence,

then into complete desuetude, in conformity with the universal rule, '*Cessante ratione, cessat ipsa res.*' This is merely stating the familiar truth as to all verbal expression; words come into being, do service, and pass away as really as bodies. For historic or literary purposes a few archaisms are retained, and, on rare occasions, made to perform some auxiliary service (generally with explanation of origin and meaning); but the masses are forgotten.

In the following extracts Mr. Anderson criticizes somewhat severely the works of lexicon-makers:—

Most of the earlier dictionaries, as far as they present material derived from law-books or supported by law, were mere lexicons or glossaries. Their chief function was to set out and very liberally to translate the many Saxon, Latin, and Norman phrases which, in the period of transition to English as the official language, composed a large portion of the text of antecedent and contemporaneous writers, many of them obsolete at the date of compilation. Useless as such matter was to those and to succeeding generations, notably to men born since 1750, it was nevertheless embodied word for word in later dictionaries. That the expressions here excepted to were never recognised as legal terms will appear at a glance. The majority of the men who originally incorporated them into their 'dictionaries,' 'lexicons,' and 'glossaries,' did not describe them as legal expressions. Why any compiler reproduced them is not apparent, unless for the reason that some former man had, and he was not to be outdone as a collector. No copyright protecting the matter in the old books, time and again have they given up their substance to the purveyor for antiquarians. So that to-day we see worthy gentlemen claiming the distinction of having collected more such dead things than any other compiler, forgetting that, practically, there is no limit to the heaps of disintegrating leaves anyone may gather in out-of-the-way places; and that, in view of the comparative uselessness of any such windrow, whether it be to one's credit that he has raked over a larger surface than some supposed rival may well be doubted.

The following is a list of the principal compilers of dictionaries:—

In 1527, John Rastell printed at London, in one volume, 16mo, '*Expositiones Terminorum Legum Anglorum et Naturæ Brevium,*' culled from the books of Littleton and others. In 1572,

there appeared, in octavo form, at London, 'Termes de la Ley; or certain and obscure words and terms of the common and statute laws expounded and explained, in French and English,' a work probably composed in French by the same author, and, after his death, translated into English by his son William.

In 1599, John Skene brought out at London an octavo work called 'De Verborum Significatione; the exposition of the termes and difficile words contained in the foure buiks of Regiam Majestatem and uthers, in the acts of Parliament, etc.' The matter in this book was printed at the end of a collection of the laws of James I., and, in 1838, was largely incorporated into a 'Dictionary and Digest of the Laws of Scotland,' by William Bell.

In 1607, John Cowell published at Cambridge, in one folio volume, his *Nomothetes: The Interpreter*, containing the genuine signification of such obscure words and terms used either in the common or statute laws of this realm.' This work is useful chiefly as a glossary to Littleton and earlier writers.

In 1626, Sir Henry Spelman, 'an eminent antiquary,' put forth at London, vol. i. (A—L), folio, of a '*Glossarium Archaologicum continens Latino-Barbara, peregrina, obsoleta, et novatæ significationis Vocabula.*' Vol. ii. (M—Z) was prepared from 'undigested manuscript notes' left by Sir Henry, by William Dougdale (and the decedent's son John), and published in 1664.

In 1656, Thomas Blount issued in one volume, at London, '*A Glossographia*, interpreting such difficult and obscure words and terms as are found either in our common or statute, ancient or modern laws.' Blount 'was never advantaged in learning by the help of an university,' and transcribed many expressions from his commonplace book of things new to him alone.

In 1749, Giles Jacob gave to the waiting world a '*Law Grammar*,' and in 1729, in two quarto volumes, '*A New Law Dictionary*;' containing the interpretation and definitions of words and terms used in the law, as also the law and practice under the proper heads and titles; together with such learning as explains the history and antiquity of the law, our manners, customs, and original government.'

The eleventh edition of this work, which appeared in 1797, was edited by Sir Thomas E. Tomlins as '*The Law Dictionary: explaining the rise, progress, and present state of English law, defining and interpreting the terms or words of art; and comprising copious information on the subjects of law, trade and*

government.' It was stated in the preface that 'the principle of this dictionary is to convey to the uninformed a competent general knowledge of every subject connected with the law, trade, and government of these kingdoms. . . . Information of which nature must interest every man of liberal education in whatever sphere; . . . by lawyers it will, doubtless, be applied to as a digest of learning previously obtained.' Tomlins asserts that he 'detected and amended many thousand errors' in the tenth edition of Jacob's work.

In 1764, Timothy Cunningham published at London, in two volumes, 'A New and Complete Law Dictionary,' or a general abridgment, treating, by preference, 'obsolete words in charters, &c.'

In 1779, Robert Kelham published, at London, 'A Dictionary of the Norman, or old French Language,' not distinctively a law-book.

In 1785, Richard Burn, LL.D., died, leaving for his son John to publish, in two volumes, at London, 'A New Law Dictionary, intended for general use as well as for gentlemen of the profession.'

In 1803, Thomas Potts issued in one volume, at London, 'A Compendious Law Dictionary, containing both an explanation of the terms and the law itself: intended for the use of the country gentleman, the merchant, and (incidentally) the professional man.'

In 1829, one James Whishaw published, at London, in one volume, 'A New Law Dictionary, containing a concise exposition of the mere terms of art and such obsolete words as occur in old legal, historical, and antiquarian writers.'

A French book largely quoted is the '*Glossarium ad Scriptores mediæ et infimæ Latinitatis, editio locupletior, opera et studio monachorum ord. S. Benedicti: a Carolo Dufresne domino Du Cange.*' Commonly cited as *Du Cange*; published in 1733, in six volumes folio, at Paris. A similar work, '*Ad scriptores mediæ et infimæ Græcitatatis,*' in two volumes folio, was published in 1688. Dufresne had studied law, but subsequently devoted himself wholly to history and philosophy.

The German work most largely cited is that of Johannes Calvinus: '*Lexicon juridicum juris Cæsarei simul, et canonici; feudalis item, civilis, criminalis, theoretici, ac practici; & in schola, & in foro usitaturum, ac tum ex ipso juris utriusque corpore, tum*

ex doctoribus & glossis, tam viteribus, quam recentioribus collectarum vocum penus.' Folio, Coloniae, 1653; Geneva, 1670, 1689. This Calvin was a professor of law at Heidelberg.

Another class of book-makers who have furnished much material for modern law dictionaries are the earlier compilers of maxims: Halkerston, Lofft, Branch, Bacon, Wingate, Noy, and Finch.

In 1612, Henry Finch wrote 'A Description of the Common Laws of England, according to the Rules of Art,' &c., consisting of 113 principal maxims. First published in French; translated into English in 1759.

In 1634, William Noy, who had been a member of Parliament and Attorney-General, died, leaving 'A Treatise of the Principal Grounds and Maxims [48] of the Lawes of this Kingdome,' published in 1641, at London, in quarto form. That a law student compiled a considerable portion of this work seems probable.

In 1658, Edmund Wingate's 'Maxims of Reason, or the Reason of the Common Law of England' (about 3,800 propositions under 214 maxims), were published in one quarto volume, at London. Wingate excelled as a writer upon mathematical subjects, but found time to instruct the legal profession upon principles of law, and his sapient utterances, when text-books were rare, were sometimes quoted.

Lord Francis Bacon's 'Maxims of the Law,' printed in his Law Tracts in 1737, in one volume duodecimo, at London, had been previously published (1636), ten years after his death, as his 'Elements of the Laws of England,' and consisting in part of 'A Collection of some (25-30) Principal Rules and Maxims of the Common Law, with their Latitude and Extent.' The tracts are still occasionally cited or quoted upon a few subjects.

In 1753, Thomas Branch published, in duodecimo form, 'Principia Legis et Aequitatis; an alphabetical collection of above 2,000 maxims, principles, or rules, definitions, and memorable sayings, in Law and Equity.' In 1823 there appeared a fifth edition, with additions, and the Latin maxims and notes translated.

In 1776, Capel Lofft's 'Maxims and Rules of the Law of England and Principles of Equity' was issued in one folio volume at London, as a part of his reports of cases adjudged in the Court of King's Bench. Formerly he was cited to a very limited extent,

notwithstanding that his deductions are as unsupported as his reported cases (12 to 14 George III.) are unreliable, and neither is now referred to in reports or text-books. 'He published legal, theological, political, poetical, and other works, of which almost all are forgotten.'

In 1823, Peter Halkerston, LL.D., published at Edinburgh, 'A Collection of Latin Maxims and Rules in Law and Equity, selected from the most Eminent Authorities on the Civil, Canon, Feudal, English, and Scotch Law.' The book contains about 1,500 maxims, with translations, in alphabetical order.

The pages of the earliest commentators, tract-writers, 'note-takers,' and digest-makers seem to have been industriously gleaned for Latin, Anglo-Norman, Anglo-Saxon, Norman-French, and Early English phrases, as the preferred material for the work of dictionary editors.

As regards the character of the expressions culled from them for explanation, a fact seemingly overlooked by the profession is, that while the number of the expressions runs into the thousands, the principle of selection is not discoverable, for there is a vast multitude left unrendered, all calling, one would think, for the elaborate explanation bestowed upon the favored ones not of a technical legal signification. Upon almost every page of Littleton, of Coke upon Littleton, and of the older text-writers and case-collectors, are expressions nowhere explained in the dictionaries, yet absolutely essential to an understanding of passages; and hence, as appropriate in such compilations, if any non-technical expressions can be, as those explained at length.

Many phrases explained in the lexicons are rendered *in loco* by the original writers. Others are self-interpreting to the intelligent reader, to whose presumed knowledge of elementary Latin at least something must be credited. A great number are peculiar formations not found outside the publication of perhaps one early writer or of one careless copyist of unofficial notes of cases increasingly enriched by 'clerical' interpolations. Moreover, it is safe to conjecture that these oldest phrases are understood, without reference to dictionaries, by the few men who, in their researches, find it agreeable to go back to the beginning of the reportorial epoch and to the oldest treatises.

Still another fact revealed by a study of these compilations is that they contain not a few phrases for which no authority is given, but which seem to have been originated by some coiner

of titles and copied, unchallenged, by later collectors; so that also these phrases, long and short and diversely iterated, are not 'encountered' outside of certain dictionaries and glossaries.

Yet more. Later compilers took matter from the earlier compilers without verifying authorities; without question or discrimination. Several of these 'authors' seem to have had or to have exercised no judgment of their own whether particular expressions were fit for insertion in a law dictionary, and would naturally be looked for in a book of that character; but were content to reproduce what their predecessors had inserted, on the good-natured assumption that no former compiler had erred, or was sophomoric, or was actually dishonest in his designs as to the size of his 'work.' In other words, the real mission of particular books seems to have been, and of others to be, to perpetuate all the blundering, all the pedantry, all the ignorance, as well as all the crudities, embodied in earlier so-called dictionaries; while the professed mission has been, or is, 'to exclude terms foreign to the proper function of a law lexicon.'

Knowledge of such things is not knowledge of law. Misconception on this subject has led word-collectors for new dictionaries into very remote solitudes, and ready acceptance of the fruits of these expeditions by inexperienced students and a few instructors has encouraged them boldly to reproduce *ad libitum* variations of archaic expressions, without question as to the character of the materials so accumulated; and, inferentially, with knowledge that the claim that those things are a part of useful old law is a pretence. From this criticism are excepted a few old terms still employed with meanings traceable to Norman or Saxon usages, and valuable as preserving the lines by which a very small portion of living law has descended. Many good lawyers express the conviction that there are myriads of old things in English law a knowledge of which is of no use except to the antiquarian, and the terms by which they were expressed have no claim to a place in a modern book; that a canvasser for a city directory might as well poll the cemeteries.

Argument will not be required to convince the thoughtful reader that in the selection of terms, phrases, maxims, &c., for purposes of definition, translation, explanation, and illustration in any work of the nature of a law dictionary, all non-legal entries must be rigorously excluded, else the compiler will be found to have lost his reckoning and his rudder, and to have drifted aim-

lessly over the limitless sea of expression, and to have multiplied columns by inserting words of whose right to a place among legal terms he is the proud discoverer. It will be generally admitted that, in addition to strictly legal words and phrases, proper for insertion as legal matter are common, unusual, or peculiar expressions found in wills, agreements, deeds, ordinances, statutes, instructions, findings, &c., and which any Court of record has construed by direct decision. In every volume of the reports of each State are cases involving a ruling upon the precise scope of one or more familiar words. To collate these cases under appropriate heads is to render the profession a highly useful service.

With respect to the important subject of authorities, I cannot refrain from digressing to say that one well-known dictionary-maker in his preface candidly states, what an inspection of his pages abundantly confirms, that 'he desires not to be understood as professing to cite cases always exactly in point; on the contrary, in many instances the authority will probably be found to be but *distantly connected* with the subject under examination, but added in order to lead the student to matters of which he may *possibly* be in pursuit.' (Italics by the writer.)

The really useful matter on some pages of these books is a good deal like Gratiano's reasons: as two grains of wheat hid in two bushels of chaff.

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### THE ELOQUENCE OF SILENCE.

"Soon after I had commenced the practice of my profession in Boston," said Mr. Webster, "a circumstance occurred which forcibly impressed upon my mind the sometimes conclusive eloquence of silence, and I wondered no longer the ancients had erected a statue to her as to a divinity.

"A man in New Bedford had insured a ship, lying at the time at the wharf there, for an amount much larger than its real value, in one of our insurance offices at Boston; this ship had suddenly taken fire and been burned down to the water's edge. It had been insured in the Massachusetts Insurance Company, of which General Arnold Wells was president and myself attorney.

"General Wells told me of the misfortune that had happened to the company in the loss of a vessel so largely insured, communicating to me at the same time the somewhat extraordinary manner in which it had been destroyed.

" 'Do you intend ? ' I asked him, ' to pay the insurance ? ' "

" ' I shall be obliged to do so, ' replied the General. "

" ' I think not, for I have no doubt, from the circumstances attending the loss, that the ship was set on fire with the intent to defraud the company of the insurance. ' "

" ' But how shall we prove that ? and what shall I say to Mr. Blank, when he makes application for the money ? ' "

" ' Say nothing, ' I replied, ' but hear quietly what he has to say. ' "

" Some few days after this conversation, Mr. Blank came up to Boston, and presented himself to General Arnold Wells at the insurance office. Mr. Blank was a man very careful of his personal appearance, and of punctilious demeanor. He powdered his hair, wore clean ruffles and well-brushed clothes, and had a gravity of speech becoming a person of respectable position. All this demanded civil treatment, and whatever you might think of him, you would naturally use no harsh language toward him. He had a defect in his left eye, so that when he spoke he turned his right and sound eye to the person he addressed, with a somewhat oblique angle of the head, giving it something such a turn as a hen who discovers a hawk in the air. General Arnold Wells had a corresponding defect in the right eye. "

" I was not present at the interview, but I have heard it often described by others who were. General Wells came out from an inner office, on the announcement of Mr. Blank's arrival, and fixed him (to use a French expression) with his sound eye, looking at him seriously, but calmly. Mr. Blank looked at General Wells with *his* sound eye, but not steadily—rather as if he sought to turn the General's right flank. "

" They stood thus, with their eyes cocked at each other, for more than a minute before either spoke, when Mr. Blank thought best to take the initiative. "

" ' It is a pleasant day, General Wells, though rather cold. ' "

" ' It is, as you say, Mr. Blank, a pleasant though rather cold day, ' replied the General, without taking his eye down from its range. "

" ' I should not be surprised, General, ' continued Mr. Blank, ' if we should have a fall of snow soon. ' "

" ' There might be more surprising circumstances, Mr. Blank, than a fall of snow in February. ' "

"Mr. Blank hereupon shifted his foot and topic. He did not feel at ease, and the less so from his desperate attempts to conceal his embarrassment.

" 'When do you think, General,' he replied, after a pause, 'that Congress will adjourn?'

" 'It is doubtful, I should think, Mr. Blank, when Congress will adjourn; perhaps not for some time yet, as great bodies, you know, move slowly.'

" 'Do you hear anything important from that quarter, General?'

" 'Nothing, Mr. Blank.'

"Mr. Blank by this time had become very dry in the throat—a sensation, I have been told, one is very apt to feel who finds himself in an embarrassing position, from which he begins to see no possibility of escape. He feared to advance, and did not know how to make a successful retreat. At last, after one or two desperate and ineffectual struggles to regain self-possession, finding himself all the while within point-blank range of that raking eye, he wholly broke down, and took his leave, without the least allusion to the matter of insurance.

"He never returned to claim the money."—*The Green Bag*.

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#### GENERAL NOTES.

EXTENSIVE OPERATIONS.—Ernest Hassberger, a Dundee merchant, was recently brought before the Dundee sheriff charged with forging bills to the extent of 112,000*l*. A plea of guilty was put in.

A WARNING.—An habitual criminal who has just been sentenced, not for the first time, by the Dusseldorf tribunal, will probably reflect during his retirement upon the saying that a still tongue shows a wise head. He was arrested on suspicion of an intent to commit a burglary. Although he was well known as an old offender, the magistrate did not see his way to convict, as there was really no evidence in the case before him. However, before discharging the prisoner, he asked him whether he had anything to say. 'Only that I hope you will let me off as lightly as you can,' was the reply. As this was considered equivalent to a plea of guilty, this extremely indiscreet offender was thereupon sent to prison for nine months.—*Daily News*.

# THE LEGAL NEWS.

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VOL. XVII.

NOVEMBER 1, 1894.

No. 21.

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## *CURRENT TOPICS AND CASES.*

The nomination of Mr. Justice Casault to the chief justiceship of the Superior Court, which became vacant by the death of Sir Francis Johnson, having transferred the residence of the chief justice from Montreal to Quebec, it was necessary to appoint an acting chief justice at Montreal. Mr. Justice Brooks, of Sherbrooke, was the senior English judge of the Superior Court, but it is understood that he was unwilling to accept an appointment which would have necessitated removal to Montreal and continuous residence there. The next in seniority was Mr. Justice Melbourne M. Tait, who has been appointed "to perform the duties of chief justice in the district of Montreal, as it is comprised and defined for the Court of Review." The appointment, according to the announcement in the Official Gazette, bears date the 27th of October. Mr. Justice Tait, who has been nearly eight years on the bench, was first named judge for the district of Bedford and subsequently transferred to Montreal. The present appointment has been received with emphatic expressions of approval from all sections of the bar, and we have no doubt that this feeling of satisfaction will increase rather than diminish as long as the position is filled by

the learned acting chief justice. We presume that, in accordance with the precedent already made in the case of Mr. Justice Casault, Mr. Justice Tait will be knighted at an early date.

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While the late Mr. Justice Aylwin was sitting in the criminal court, the proceedings were interrupted on one occasion by the music of a band on the Champ-de-Mars, where one or more battalions of regulars were at drill. The learned judge dispatched the crier, Mr. McLaughlin, to present his compliments to the commanding officer, and request a discontinuance of the music,—a request which after a few minutes was complied with. The late Chief Justice Johnson, during the reconstruction of the court house, frequently sent orders to suspend work which was interrupting the proceedings, and on one occasion ordered the crier to bring before the court a workman who persisted in hammering while judgments were being delivered. The expense of the reconstruction, it has been stated, was considerably increased by these forced suspensions of work, which at times were extremely inconvenient to the contractors. Similar incidents, it appears from the *London Law Journal*, have occurred in England and elsewhere. Sir James Hannen, when sitting as vacation judge, had to stop the builders engaged in repairing the Royal Courts. Chief Justice Higginbotham, of Victoria, in 1887 committed a builder who, after an order from the court to desist, persisted in carrying on a business involving a considerable amount of hammering in a yard adjacent to the Criminal Court in Melbourne (*In re Dakin*, 13 Victoria L. R. 522). His opinion in support of the decision is elaborate and exhaustive of the cases on contempt. His decision was sustained on appeal by the full court as a judgment which, after a careful examination of the authorities, came to the conclusion that the fact that the noise is caused in the exercise of a lawful trade is no answer where an order to desist during

the sittings of the court interfered with has been made and served, and that the existence of an alternative remedy by information or indictment for nuisance on the contempt is no answer to proceedings for summary committal, and they added that if law courts in a particular place interfere with neighbouring businesses, that is the fault of the authority which constructed them, and not of the judges (18 Victoria L. R. 539-547). This decision, the *Law Journal* says, is thoroughly in accord with the law of England, and a similar case arose recently at the Old Bailey. The Common Serjeant and his grand jury were disturbed by workmen hammering girders in some new buildings near the Court. He threatened to commit the foreman of the works unless the noise were stopped; but stayed his hand on finding that the operation in progress was critical and must be finished. Thus he may be said to have suggested a new qualification to contempt of Court—viz. that a noise made in completing works necessary for the safety of the public or the workmen engaged, even if it disturbs a court and is done in disobedience to an order of the Court, is not punishable as being done under inevitable necessity. Oswald on Contempts, p. 27, lays down the principle that it is a grave contempt of court to persist in causing any noise, even outside the precincts of the court, which interrupts its proceedings.

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Mr. Justice Cave, of the English bench, expressed himself somewhat strongly, on a recent occasion, with regard to the efforts of policemen to extract confessions from persons accused of crime. - His Lordship said: "It is the duty of police constables not to get evidence by cross-examining a prisoner and asking questions, but to depose to the facts. I have a great distrust of these things, and the system is carried on in this country to a very wrong extent. It is monstrous the way in which the police constables in this country try to extract confessions out of prisoners." On the other side of the English channel

the judges do this sort of work, and we are inclined to think that prisoners, if they had a choice, would prefer to be left to the tender mercies of the constables. But it must be added that Mr. Justice Cave is undoubtedly right.

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The year 1894, already marked by the disappearance of several prominent figures at the bar, has not approached its close without a further depletion of the ranks. The late Mr. Mercier, Q.C., would have occupied a higher position at the bar if his attention had not been so continuously devoted to matters political. He was, however, an incisive speaker, well versed in the principles of the law, and a man of great capacity for work. The late Mr. Joseph Duhamel, Q.C., had at one time a very extensive practice in the Circuit Court, and was one of the few lawyers who appeared to grow rich at the bar. He was endowed with a vigorous constitution and immense energy, and his death at the early age of 57 was somewhat of a surprise to his *confrères*. Coroner Jones of Montreal, was not a member of the bar, but deserves notice as one of the oldest, if not the oldest coroner in the world. He was born in 1808, appointed coroner in 1887, and filled the office for 57 years, his official life dating from the beginning of the present reign. He was a gentleman of kindly disposition and generous impulses, and he always endeavored to discharge his at times painful duties with as little offence or annoyance as practicable.

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#### SUPREME COURT OF CANADA.

OTTAWA, 31 May, 1894.

Quebec.]

GOVERNOR & COMPANY OF ADVENTURERS OF ENGLAND  
V. JOANNETTE.

*Game laws—Arts. 1405—1409, Rev. Stats. P. Q.—Seizure of furs killed out of season—Justice of the Peace—Jurisdiction—Prohibition—Writ of.*

One F. X. J., game-keeper, seized certain boxes of furs on

board the schooner "Stadacona," in the boundaries of the City of Quebec, after having taken out a search warrant issued by the judge of the Court of Sessions of the Peace. While the examination of the furs was going on at the police court the appellants took out a writ of prohibition, and the writ was made absolute by the Superior Court, but subsequently quashed on appeal to the Court of Queen's Bench (appeal side). The judge of the Sessions swore the experts before confiscation, to report on the condition of the furs at the time they were seized by the game-keeper.

*Held*, affirming the judgment of the Court below, (R. J. Q., 3 B. R. 211) that under art. 1405, read in connection with art. 1409 R. S. P. Q., the game-keeper is authorized to seize furs on view on board a schooner, even without a search warrant, and to have them brought before a justice of the peace for examination.

2. That the judge of the Court of Special Sessions of the Peace, having jurisdiction to try the alleged offence of having furs killed out of season, a writ of prohibition is not an appropriate remedy for any irregularity in the procedure.

Appeal dismissed with costs.

*G. Stuart, Q. C.*, for appellants.

*Languedoc, Q. C.*, for respondents.

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5 November, 1894.

Quebec.]

**E. LARIVIÈRE V. THE SCHOOL COMMISSIONERS OF THE CITY OF  
THREE RIVERS.**

*Bond in appeal—School mistress—R. S. P. Q., sec. 2073—Fees of office—Future rights—R. S. C. ch. 135, sec. 29 (b).*

E. Larivière, a school mistress, by her action claimed \$1243 as fees due to her in virtue of sec. 68, ch. 15, C. S. L. C. (now sec. 2073 R. S. P. Q.), which were collected by the school commissioners of the City of Three Rivers while she was employed by them. At the time of the action the plaintiff had ceased to be in their employ. The Court of Queen's Bench for Lower Canada (Appeal side), affirming the judgment of the Superior Court, dismissed the action.

On a motion to the Supreme Court of Canada to allow bond in appeal, the same having been refused by a Judge of the Court

below, the Registrar of the Supreme Court, and a Judge in Chambers, on the ground that the case was not appealable,

*Held*, that the matter in dispute did not relate to any office or fees of office within the meaning of sec. 29 (b) of the Supreme and Exchequer Courts Act, c. 135.

2. Even assuming it did, that there being no rights in future involved, and the amount in dispute being less than \$2,000, the case was not appealable.

3. The words "where the rights in future might be bound" in said sub-sec. (b) of sec. 29, govern all the preceding words, "any fee of office," etc. *Chagnon v. Normand* (16 Can. S. C. R. 661), & *Gilbert v. Gilman* (16 Can. S. C. R. 189) referred to.

Motion refused with costs.

*Ritchie*, for motion.

*McDougall contra*.

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1 May, 1894.

Exchequer.]

#### BULMER V. THE QUEEN.

*Crown domain—Disputed territory—License to cut timber—Implied warranty of title—Breach of contract—Damages—Cross appeal—Supreme Court Rules, 62 and 63.*

The claimant applied to the Government of Canada for licenses to cut timber on ten timber berths situated in the territory lately in dispute between that Government and the Government of Ontario. The application was granted on the condition that the applicant would pay certain ground-rents and bonuses, and make surveys and build a mill. The claimant knew of the dispute, which was at the time open and public. He paid the rents and bonuses, made the surveys and enlarged a mill he had previously built, which was accepted as equivalent to building a new one. The dispute was determined adversely to the Government of Canada at the time six leases or licenses were current, and consequently the Government could not renew them. The leases were granted under sections 49 and 50 of 46 Vic., ch. 17, and the regulations made under the act of 1879, provided that "the license may be renewed for another year subject to such revision of the annual rental and royalty to be paid therefor as may be fixed by the Governor in Council."

On a claim for damages by the licensee,

*Held*, 1. Orders in Council issued pursuant to 46 Vic., ch. 17, secs. 49 and 50, authorising the Minister of the Interior to grant licenses to cut timber did not constitute contracts between the Crown and proposed licensees, such Orders in Council being revocable by the Crown until acted upon by the granting of licenses under them.

2. That the right of renewal of the licenses was optional with the Crown, and that the claimant was entitled to recover from the Government only the moneys paid to it for ground rents and bonuses.

The licenses which were granted and were actually current in 1884 and 1885, confer upon the licensee "full right, power and license to take and keep exclusive possession of the said lands, except as hereinafter mentioned for and during the period of one year from the 31st of December, 1883, to the 31st December, 1884, and no longer."

*Quære*, though this is in law a lease for one year of the lands comprised in the license, was the Crown bound by any implied covenant to be read into the license for good right and title to make the lease and for quiet enjoyment?

*Held*, also, that a cross appeal will be disregarded by the Court when rules 62 and 63 of the Supreme Court Rules have not been complied with.

Appeal dismissed without costs.

*McCarthy, Q. C., & Ferguson, Q. C.*, for appellant.

*Robinson, Q. C., & Hogg, Q. C.*, for respondent.

21 May, 1894.

British Columbia.]

THE SHIP "MINNIE" v. THE QUEEN.

*Seal Fishery (North Pacific) Act*, 1893—56–57 Vic. (*U. K.*) ch. 23, secs. 1, 3 and 4—*Judicial notice of order in council thereunder—Protocol of examination of offending ship by Russian war vessel, Sufficiency of—Presence within prohibited zone—Bona fides—Statutory presumption of liability—Evidence—Question of fact.*

The Admiralty Court is bound to take judicial notice of an order in council from which the Court derives its jurisdiction, issued under the authority of the Act of the Imperial Parliament, 56 and 57 Vic. c. 23, *The Seal Fishery (North Pacific) Act* 1893, without proof.

A Russian cruiser manned by a crew in the pay of the Russian Government, and in command of an officer of the Russia navy, is a "war vessel" within the meaning of the said order in council, and a protocol of examination of an offending British ship by such cruiser signed by the officer in command, is admissible in evidence in proceedings taken in the Admiralty Court, in an action for condemnation under the said Seal Fishery (North Pacific) Act, 1893, and is proof of its contents.

The ship in question in this case having been seized within the prohibited waters of the thirty mile zone round the Komandorsky Islands, fully equipped and manned for sealing, not only failed to fulfil the *onus* cast upon her of proving that she was not used or employed in killing or attempting to kill any seals within the seas specified in the order in council, but the evidence was sufficient to prove that she was guilty of an infraction of the statute and order in council.

Judgment of the court below affirmed.

Appeal dismissed with costs.

*Belyea* for the appellant.

*Hogg, Q. C.*, for the respondent.

21 May, 1894.

British Columbia.]

MYLIUS V. JACKSON.

*Pleadings—Sufficient traverse of allegation by plaintiff—Objection first taken on appeal.*

The plaintiff, by his statement of claim, alleged a partnership between two defendants, one being married whose name, on a re-arrangement of the partnership, was substituted for that of her husband without her knowledge or authority.

*Held*, reversing the judgment of the court below, that denial by the married woman that "on the date alleged or at any other time she entered into partnership with the other defendant" was a sufficient traverse of plaintiff's allegation to put the party to proof of that fact.

*Held*, also, that an objection to the insufficiency of the traverse, would not be entertained when taken for the first time on appeal, the issue having been tried on the assumption that the traverse was sufficient.

Appeal allowed with costs.

*Belyea*, for appellant.

*Chrysler, Q. C.*, for respondent.

31 May, 1894.

Ontario.]

ELLICE V. HILES.

ELLICE V. CROOKS.

*Municipal Corporation—Drainage—Action for damage—Reference—Drainage Trials Act, 54 Vic., ch. 51—Powers of referee—Negligence—Liability of municipality.*

Upon reference of an action to a referee under The Drainage Trials Act of Ontario (54 V., c. 51), whether under sec. 11 as an action for damages from construction or operation of drainage works, or sec. 19 as a case in which, in the opinion of the court, the proper proceeding is under the act, the referee has full power to deal with the case as he thinks fit, and to make, of his own motion, all necessary amendments to enable him to decide according to the very right and justice of the case, and may convert the claim for damages under said sec. 11, into a claim for damages arising from construction of the work under a valid by-law, under sec. 591 of the Municipal Act.

In a drainage scheme for a single township, the work may be carried into a lower adjoining municipality for the purpose of finding an outlet without any petition from the owners of land in such adjoining township to be affected thereby, and such owners may be assessed for benefit. *Stephen v. McGillivray* (18 Ont App. R. 516), and *Nissouri v. Dorchester* (14 O. R. 294) distinguished.

One whose lands in the adjoining municipality have been damaged cannot, after the by-law has been appealed against and confirmed, and the lands assessed for benefit, contend before the referee that he was not liable to such assessment, the matter having been concluded by the confirmation of the by-law.

A municipality constructing a drain cannot let water loose just inside or anywhere within an adjoining municipality without being liable for injury to lands in such adjoining municipality thereby.

Where a scheme for drainage work proves defective and the work has not been skilfully and properly performed, a proper route not chosen, it is not continued to a proper outlet and is left unfinished for a long time in an adjoining municipality, where it is carried to find an outlet so that the water is turned loose, and came upon lands therein, the municipality constructing it are

not liable to persons whose lands are damaged in consequence of such defects and improper construction as tort feasons, but are liable under sec. 591, Municipal Act, for damage done in construction of the work or consequent thereon.

The referee has no jurisdiction to adjudicate as to the propriety of the route selected by the engineer and adopted by the by-law, the only remedy, if any, being by appeal against the project proposed by the by-law.

A tenant of land may recover damage suffered during his occupation from construction of drainage work, his rights resting upon the same foundation as those of a freeholder.

*Wilson, Q. C., and Smith, Q. C., for appellants.*

*Christopher Robinson, Q. C., for respondents.*

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9 October, 1894.

[Ontario.]

ALLISON V. McDONALD.

*Mortgage—Collateral security—Joint debtors—Discharge.*

Two partners borrowed money, giving as security a mortgage on partnership property and a joint and several promissory note. The partnership having been dissolved, the mortgagee gave the members of the firm who continued to carry on the business, and who had assumed the liabilities, a discharge of the mortgage on his undertaking to pay back the money borrowed, which he failed to do, but mortgaged the property again, and finally became insolvent, and absconded. An action having been brought against the retiring partner on the note,

*Held*, affirming the decision of the Court of Appeal (20 Ont. App. R. 695), which reversed the judgment of the Divisional Court (23 O. R. 288), that the plaintiff could not compel the retiring partner to pay the mortgage debt, without being prepared on payment to re-convey the lands mortgaged, which he had incapacitated himself from doing. His action, therefore, was rightly dismissed.

Appeal dismissed with costs.

*Aylesworth, Q. C., for appellant.*

*John A. Robinson, for respondent.*

9 October, 1894.

Ontario.]

## WALSH V. TREBILCOCK.

*Criminal law—Betting on election—Stakeholder in bet between individuals—R. S. C. c. 159, s. 9—Accessory—R. S. C. c. 145—Recovery from stakeholder—Parties in pari delicto.*

W. and another made a bet on the result of an election for the House of Commons, and each deposited the sum bet with T. By the result of the election, W. lost his bet and the money was paid by T. to the winner. W. then brought an action against T. for the amount he had deposited with him claiming that the transaction was illegal and the contract to pay the money void.

*Held*, reversing the decision of the Court of Appeal (21 Ont. App. R. 55) Taschereau, J., dissenting, that T. in becoming the depository of the money was guilty of a misdemeanour under R. S. C. c. 159, s. 9 (Crim. Code, sec. 204); that W. was an accessory by R. S. C. c. 145; and that the parties being in *pari delicto*, and the illegal act having been performed, W. could not recover.

Appeal allowed with costs.

*Meredith, Q.C.*, for appellant.

*Aylesworth, Q.C.*, and *McKillop*, for respondent.

### ELECTRIC STREET RAILWAYS—ADDITIONAL BURDEN.

The case of *Detroit City Ry. v. Mills*,<sup>1</sup> decided by the Supreme Court of Michigan, and very recently affirmed by the case of *Dean v. Ann Harbor St. Ry Co.*,<sup>2</sup> almost convinces one of the perfect elasticity of the common law. But in spite of the court's appeal to the progressive tendency of the times, common experience and observation arouse a feeling of dissent from the proposition that "the use of a street by an electric railroad, with poles and overhead wires, is not an additional servitude for which abutting owners may demand compensation."

It seems well established that at the present time an ordinary

<sup>1</sup> 48 N. W. Rep. 1007.

<sup>2</sup> 53 N. W. Rep. 396.

steam railroad imposes a new burden,<sup>1</sup> and that a horse railroad does not;<sup>2</sup> and the distinction, which is one of degree, turns on the different effects produced on the streets occupied by the railroads, and on the beneficial use of abutting property. In allying the legal position of the electric railroad to that of the horse railroad, the Michigan court seems to have made assumptions and statements of fact which will not bear close examination. Grant, J., tells us that electric cars are not more noisy, do not cause greater obstruction or hindrance, impose no greater burden, except by their poles, than horse-cars; and that they do not occupy more space than horse-cars with the horses that draw them. From these propositions we must, with all deference, dissent. The noise and jar of the ordinary electric cars, often joined in trains, the speed with which they run, the danger of driving along and upon the tracks, or even across them, the risk of injury or death from contact with broken wires, the unsightliness of the poles and cars and cross-wires and guard-wires and trolley-wires, are all matters of common knowledge.

That telegraph and telephone poles are an additional servitude is fairly well settled,<sup>3</sup> the cases to the contrary, such as *Pierce v. Drew*,<sup>4</sup> in Massachusetts, being based on highly artificial analogies between the ancient and modern use of highways for purposes of communication. To avoid this class of decisions, the Michigan court would say, with the Supreme Court of Rhode Island,<sup>5</sup> that telegraph and telephone wires are only very

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<sup>1</sup> *Mahon v. Ry. Co.*, 24 N. Y. 653; *Kucheman v. Ry. Co.*, 46 Ia. 366; *Chamberlain v. Ry. Co.*, 41 N. J. Eq. 43; *Terre Haute, &c., Ry. Co. v. Scott*, 74 Ind. 29; *Indianapolis Ry. Co. v. Hartley*, 67 Ill. 439; *Stetson v. Ry. Co.*, 75 Ill. 74; *Imlay v. Ry. Co.*, 26 Conn. 249; *Adams v. Ry. Co.*, 18 Minn. 260 (see also 22 Minn. 149); *Cox v. Ry. Co.*, 48 Ind. 178; *Carson v. Ry. Co.*, 35 Cal. 325 (see also 41 Cal. 256); *Blerch v. Ry. Co.*, 43 Wis. 183; *Laurence Ry. Co. v. Williams*, 35 Ohio St. 168; *Williams v. New York Central Ry. Co.*, 16 N. Y. 97; etc. See also cases and authorities cited in *Taggart v. Ry. Co.*, 19 Atl. Rep. 326.

<sup>2</sup> *Elliott v. Fairhaven Ry. Co.*, 32 Conn. 579; *A. G. v. Met. Ry. Co.*, 125 Mass. 515; 2 *Dillon on Mun. Corp.*, 868, and cases cited in notes; *Shea v. Ry. Co.*, 44 Cal. 414; *Citizens' Coach Co. v. Camden H. R. Co.*, 33 N. J. Eq. 267.

<sup>3</sup> See 2 *Dillon on Mun. Corp.*, § 698a, and cases cited.

<sup>4</sup> 136 Mass. 75.

<sup>5</sup> *Taggart v. Ry. Co. (R. I.)*, 19 Atl. Rep., 326.

indirectly used to facilitate the use of streets for travel and transportation, whereas the poles and various wires of the electric railroad are distinctly ancillary to the use of the streets as such. This distinction is, as Judge Dillon remarks, "so fine as to be almost impalpable."<sup>1</sup>

It is said that the streets of a city may be used for any purpose which is a necessary public one, and the abutting owner will not be entitled to new compensation, in the absence of a statute giving it. As it stands, this statement can scarcely be maintained. Granting that the abutting owner dedicates to the public the whole beneficial use of part of his land for the purposes of a street, his property rights of light, air, and access free from danger to his remaining land, still subsist. Surely the need of the public for steam railroads is much greater than its need for electric railroads; yet steam railroad corporations would not be allowed to run their trains on public streets merely as a new method of using an old easement, and if they would lay their tracks across lands not belonging to them, they must obtain the right to do so by purchase or condemnation, into which consequential damages enter as an element. The need of the public is to be considered when the right to take the property is under consideration, and not when the courts have to decide whether compensation shall be allowed.

If the public needs a new method of transportation, the public can and should pay for private property rights destroyed or impaired in establishing that new method of transportation.—*Harvard Law Review*.

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#### GRAND JURIES.

From time to time a desire is manifested to abolish grand juries. When a case is committed for trial it seems unnecessary to have a fresh investigation, and at present grand juries have a way of ignoring bills relating to certain offences which shows small respect for the committing justice, and indicates a special view of morality which may be termed grand jurors' ethics. And many grand jurors see and protest against the waste of time involved in re-hearing cases *in camera* and *ex parte* which have already been heard on both sides in a petty sessional Court. But

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<sup>1</sup> 2 Dillon on Mun. Corp., p. 893, n.

there is still something to be said for the old law, which has secured that no man can be put on his trial for a serious crime without the assent of twelve laymen unaffected by fear or favour towards him or the Crown; and it is in any event desirable to retain to prosecutors the right of going before the grand jury where the magistrates have dismissed the charge. In some colonies the grand jury has been superseded in *toto* by the Attorney-General; in others, such as Victoria, most prosecutions are instituted by leave of the Attorney-General; but where magistrates refuse to commit for trial, or the Attorney-General will not act, the High Court can intervene, and a grand jury receive and pass a bill of indictment. In this country it would be an improvement on the present system (but not easy to arrange) if the functions of the grand jury were confined to voluntary bills so long as they are allowed to continue, and cases within the Vexatious Indictments Act, which ought to be extended to all offences. In this event the grand jury could be summoned only when wanted.

Reference has been made to the history of grand juries and the date of the severance of the functions of grand and petty juries. Whether the two were at any time the same (see Reeves and Finlason, 'Criminal Law,' vol. ii. p. 163), or the second was developed on the abolition of trial by ordeal (at the instance of the Lateran Council) or the disuse of wager of law and trial by battle, is a matter which we will not now discuss. But this much is clear, that the grand jurors were regarded as they are still styled, jurors *for* our lady the Queen (*pro rege*), in distinction to the petty jury summoned at the election of the prisoner, who under the old system was on arraignment asked how he would be tried, and replied, 'By God and my country.' The first words in this formula are possibly a survival of terms used with reference to the ordeal; but the words '*my country*' identify the visne (*vicinetum*) or special venue to which the writ of *facias venire juratores* had to be awarded, and doubtless suggested the inference, but do not prove, that the petty jury were a kind of witnesses for the prisoner. Indeed, the usage, if not the law, points to a different view of the constitution of the petty jury, and we may call attention to the valuable contribution by Mr. L. O. Pike (in his introduction to the Year book, 14 & 15 Edw. III.) towards ascertaining the real constitution of the petty jury, and the causes of the final separation of the grand and petty jurors. His conclusions may be thus summed up: It is certain that indictors

or members of the grand jury commonly sat on the jury which tried the accused—i.e. that the offender could be tried by his accusers, or a jury consisting partly of his accusers, and that the right of challenge for cause, though it existed in capital cases, was not absolute. In 1340 a commission of oyer and terminer was issued to try Chief Justice Willoughby and other justices for acting in the exercise of their offices unfaithfully and deceitfully towards the king and his people, a precedent which might have been of some interest in the recent case of *Anderson v. Gorrie*. At the trial of Willoughby it was laid down by Mr. Justice Parning that in cases of indictment there should be upon the jury to try the accused both 'indictors' and others, and that in the interest of the king care should be taken to have indictors on the jury. But this statement of the law led to the enactment of 25 Edw. III., stat. 5, c. 3, which entitles the accused to challenge for cause any indictor (i.e. member of a grand jury or coroner's jury) who is put upon the inquest or petty jury. This Act is forgotten but unrepealed, and unaffected by the County Juries Act, 1825 (6 Geo. IV., c. 50), and it may be regarded as putting an end to any tendency to confuse the functions of the jury of accusation and jury of trial; but it does not absolutely disqualify a grand juror from sitting on the petty jury; nor would his presence invalidate the verdict (*Regina v. Edmunds*, 1 St. Tr. (N.S.) 785, at 883).—*Law Journal (London)*.

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#### GENERAL NOTES.

**WOMEN AS BARRISTERS.**—A bill has been read a second time in the House of Representatives in New Zealand, admitting women to practise at the bar, and at the same time reducing examination fees to a minimum, and providing that examination papers shall be set in English only.

**FOREIGN DIVORCE LAWS.**—Nearly a year ago circulars were sent by Lord Rosebery to English representatives abroad asking that information might be supplied to the House of Commons respecting the laws of divorce in the most important of our colonies, as well as in foreign countries. Some very curious answers have been received, and an entertaining Blue-book, just issued, is the result. In America very curious differences exist in different States; 'it is extremely difficult to give even an outline of the marriage laws prevailing in this country,' remarks our

representative, as there are forty-seven sovereign States, each claiming exclusive control over the matter of the marriage of its citizens. Hence it comes that in Montana and Washington twenty-one is the earliest marrying age for a man and eighteen for a woman, while in New Jersey or Connecticut the ages are respectively fourteen and twelve. All that a schoolboy in Washington, therefore, has to do in order to wed a school-girl friend is to induce her to lay her skipping-rope aside for a time and fly with him over the border into a more complaisant State. In Sweden and Norway weddings in church are exceptional, and you are not bound to give the officiating clergyman any fee whatever. In Switzerland the only fee is one to cover expense of the publication of notice of marriage in a local newspaper and registration, and you can be married at any hour you please. In Greece a bishop's license costs three drachmas, or half-a-crown, and the registration five drachmas. In Belgium they make a little charge for a 'marriage pamphlet' presented to the parties, and for stamps, but even these are dispensed with if the parties make a declaration of poverty. On the subject of the grounds of divorce very great divergences occur between the laws of different nations. In France to call a wife 'canaille' before her children justifies a decree of divorce, as also does a wife's 'refusal to obey her husband when it is a question of a theatrical engagement.' A husband can also be divorced for ill-treating his mother-in-law or his step-children. In spite of the proverb about the advantages of commencing matrimony with a little aversion, it is the law in Germany that 'insuperable aversion' may become a ground of divorce if both parties consent and there are no children. Roumania distinguishes itself by an enactment that a divorce can be pronounced if the tribunals are satisfied that 'existence in common is impossible.' In Massachusetts and Mississippi, 'the habitual use of opium or like drug' is held a sufficient excuse for untying the marriage knot; and in some States, as West Virginia, marriage will be annulled if one of the parties is a negro and the other a white person. As to the cost of divorce, the cheapest and simplest kind in the States costs about 100 dollars; in Germany it varies from 7*l.* 10*s.* up to 45*l.* In Russia, Consistorial Courts pronounce in divorce cases, and the expense is great. Saxony's modest figure is from 2*l.* 10*s.* up to 5*l.*—*Westminster Gazette.*

# THE LEGAL NEWS.

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VOL. XVII.

NOVEMBER 15, 1894.

No. 22.

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## CURRENT TOPICS AND CASES.

The November appeal list at Montreal disclosed one result of the forced abridgement of the September term—the list showed an increase of four cases. The number of new appeals entered between the two terms was 22. A noticeable feature of recent calendars is the large proportion of appeals from the country districts. In the 69 cases on the November list, for instance, there are 44 Montreal appeals, and 25 from the other districts, as follows:—8 from Ottawa, 7 from St. Francis, 2 from Bedford, and the same number from Terrebonne, St. Hyacinthe and Richelieu, 1 from Joliette and 1 from Iberville.

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A case determined in the *Cour de Cassation* of Belgium, reported in Sirey, 92.4.1., presented a question similar to that which arose in the cases of *Benning v. Thibaudeau*, and the *Ontario Bank v. Chaplin*, in our own courts some years ago, (M. L. R., 2 S. C. 388: M. L. R., 5 Q. B. 407, 425), upon which there was great divergence of opinion amongst the judges. The question was this: Is a creditor entitled to rank for the full amount of his claim

upon the separate estates of insolvent debtors jointly and severally liable for the amount of his debt, or is he obliged to deduct from his claim any amount previously received from the estates of the other parties jointly and severally liable therefor? Mr. Justice Mathieu, in the Superior Court, held that any amount previously received had, in such case, to be deducted from the claim. But this judgment was reversed by Judges Torrance, Jetté and Loranger in the Court of Review. In the Court of Appeal, Mr. Justice Mathieu's judgment was unanimously restored. In the Supreme Court, Chief Justice Ritchie and Mr. Justice Taschereau took the same view as the Court of Appeal, but Justices Strong and Fournier adopted the conclusions of the Court of Review. The Belgian Cour de Cassation, in the judgment referred to, upholds the views of our Court of Appeal, and those of Chief Justice Ritchie and Mr. Justice Taschereau, in the Supreme Court, and of Mr. Justice Mathieu, in the Superior Court.

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The Supreme Court of Missouri is not disposed to extend exemptions from jury duty. A dentist having claimed exemption as a practitioner of medicine, the Court said if the applicant was exempt from jury duty because, as he alleged, he treated professionally 'diseases of the oral cavity,' so also would his professional brother be exempt, who, with equal scientific skill, treated diseases or malformations of the feet, and who was content to be styled a corn doctor. *State v. Fisher*, 22 L. R. A. 799.

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#### NEW PUBLICATIONS.

THE PATENT LAW OF THE DOMINION OF CANADA, by John G. Ridout, barrister, etc., of the firm of Ridout & Maybee, solicitors of Patents. Toronto, Rowsell & Hutchison, Publishers, 1894, pp. 590. Cloth, \$5.50. Half law calf, \$6.

This is the first treatise on the Patent law of Canada. About 1100 reported cases have been examined and noted under the

appropriate headings. It is evident that the author has expended much time and care in the preparation of the work. He has the great advantage of being not merely a barrister, but also a patent solicitor of nine years' experience, superadded to the practical knowledge acquired in his former profession of civil engineer. The author, it may be mentioned, had the distinction, in 1863, of appearing at the head of the list of all those who went up for examination at Her Majesty's Staff College, Sandhurst, the leading school of the British army for engineering, mathematics, and scientific learning, and open to the whole of the army. Lieut. J. G. Ridout, then of the 100th (Canadian) Regiment, was not only at the head of the list, but was more than 200 marks above the next man.

The compilation is very complete. The text of the Patent Act in the body of the work includes all amendments to date. Besides the Patent Office Rules and Forms, there are inserted a number of general forms relating to patents and to practice in the Exchequer Court of Canada, in *scirefacias* and other cases. Mr. Ridout must be complimented upon the ability with which he has executed the formidable task proposed to himself, and he has certainly earned the thanks of all who have occasion to examine any subject connected with this branch of law which is rapidly growing in importance. We can commend the work with confidence to the attention of our readers, and trust that it will have an extensive circulation throughout all the provinces of the Dominion.

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TABLES, for ascertaining the present value of vested and contingent rights of Dower, Curtesy, Annuities and of other life estates, Damages for death or injury by wrongful act, negligence or default. Computed and compiled by F. Giaque, A.M., and H. B. McClure, A.M., members of the Cincinnati Bar. Cincinnati, Robert Clarke & Co., publishers.

The tables comprised in this work are of great value, and give the results of long and intricate calculations. They are indispensable to accountants and solicitors who need to have at hand a trustworthy manual to which to refer on the subjects of annuity, life estates, etc. The work is very clearly printed and issued in a neat and substantial form.

## SUPREME COURT OF CANADA.

Ottawa, 13 Oct. 1894.

Quebec.]

## MCKAY v. HINCHINBROOKE.

*Appeal—Supreme and Exchequer Courts Act, R. S. C., ch. 135, secs. 24 and 29—Costs.*

*Held*, that a judgment in an action by a ratepayer contesting the validity of a homologated valuation roll (a), is not a judgment appealable to the Supreme Court of Canada under section 24 (g) of the Supreme and Exchequer Courts Act; (b) and does not relate to future rights coming under sub-sec. (f) of sec. 2, of the Supreme and Exchequer Courts Act.

*Held*, also, that the valuation roll sought to be set aside in this case having been duly homologated and not appealed against within the delay provided in art. 1061 M. C., the only matter in dispute between the parties was a mere matter of costs, and therefore the Court would not entertain the appeal,—following *Moir v. Corporation of the Village of Huntingdon* (19 Can. S. C. R. 363).

Appeal dismissed with costs.

*Geoffrion, Q. C., & Brossoit, Q. C.*, for appellant.

*Maclaren, Q. C., & Laurendeau*, for respondents.

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9 October, 1894.

Quebec.)

## BURY v. MURRAY.

*Absolute transfer—Commencement of proof by writing—Oral evidence—When inadmissible—Arts. 1233, 1234 C. C.—Prête-nom—Compensation—Defence—Taking advantage of one's own wrong.*

Verbal evidence is inadmissible to contradict an absolute notarial transfer, even where there is a commencement of proof by writing not amounting to a full admission. Art. 1234 C. C.

A defendant cannot set up by way of compensation to a claim due to plaintiff, a judgment (purchased subsequent to the date of the action) against one who is not a party to the cause, and for whom the plaintiff is alleged to be a *prête-nom*.

In an action to recover an amount received by the defendant for the plaintiff, the defendant pleaded, *inter alia*, that the action was premature inasmuch as he had got the money irregularly

from the treasurer of the Province of Quebec on a report of distribution of the prothonotary before all the contestations to the report of collocation had been decided.

*Held*, affirming the judgment of the Court below, that this defence was not open to the defendant as it would be giving him the benefit of his own improper and illegal proceeding.

Appeal dismissed with costs.

*Barnard, Q. C.*, and *Lafleur*, for appellant.

*Martin*, for respondent.

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8 November, 1894.

Quebec.]

LABERGE v. EQUITABLE LIFE ASSURANCE SOCIETY.

*Appeal—Amount in dispute—54-55 Vic., ch. 25, sec. 3, sub-sec. 4.*

By virtue of sub-sec. 4 of sec. 3 of ch. 25 of 54-55 Vic., in determining the amount in dispute in cases in appeal to the Supreme Court of Canada, the proper course is to look at the amount demanded by the statement of claim, even though the amount in controversy in the court appealed from was less than \$2,000,—the plaintiff having obtained a judgment in the court of original jurisdiction for less than \$2,000, and not having taken a cross appeal upon the defendants appealing to the intermediate Court of Appeal. *Levi v. Reed*, (6 Can. S. C. R. 482) affirmed and followed. Gwynne, J., dissenting.

Motion to quash refused with costs.

*Laflamme*, for appellant.

*Macmaster, Q. C.*, for respondents.

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11 October, 1894.

Quebec.]

WEBSTER v. SHERBROOKE.

*Appeal—Right of—Petition to quash by-law under sec. 4389 R. S. P. Q.—R. S. C., ch. 135, sec. 24 (g).*

Proceedings were commenced in the Superior Court by petition to quash a by-law passed by the Corporation of the City of Sherbrooke under sec. 4389 R. S. P. Q., which gives the right to petition the Superior Court to annul a municipal by-law. The

judgment appealed from, reversing the judgment of the Superior Court, held that the by-law was *intra vires*.

On motion to quash,

*Held*, that the proceedings being in the interest of the public, equivalent to the motion or rule to quash of the English practice, the court had jurisdiction to entertain the appeal, under sub-sec. g, of sec. 24, ch. 135 R. S. C. *Sherbrooke v. McManamy* (18 Can. S. C. R. 594) and *Verchères v. Varennes* (19 Can. S. C. R. 356) distinguished.

Motion refused with costs.

*Brown, Q. C.*, for motion.

*Panneton, Q. C.*, contra.

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9 October, 1894.

Ontario.]

TRENT VALLEY WOOLLEN MFG. CO. v. OELRICHS.

*Sale of goods by sample—Right of inspection—Place of delivery—  
Sale through brokers—Agency.*

C. & Co., brokers in New York, sent a sample of wool to the T. Mfg. Co. at Campbellford, in Canada, offering to procure for them certain lots at certain prices. After a number of telegrams and letters between the company and C. & Co., the offer was accepted by the former at the price named for wool "laid down in New York," and payment was to be in six months from arrival of wool at New York without interest. Bought and sold notes were respectively delivered to the company and the brokers, the latter signing the sold note. The wool having arrived the company would only accept it subject to inspection when it reached their place of business in Canada, to which the seller would not agree, and it was finally sold to other parties and an action brought against the company for the difference between the price realized on such sale and that agreed on with the brokers.

*Held*, affirming the decision of the Court of Appeal for Ontario (20 Ont. App. R. 673), that the brokers could be considered to have acted as agents of the company in making the contract, but, if not, the company having never objected to the want of authority in the brokers nor to the form of the contract, must be held to have acquiesced in the contract as valid and duly authorized.

*Held*, also, that there being no special agreement to the contrary, the place for inspection of the wool by the buyer was New York, where the wool was to be delivered, and it made no difference that the company had previously bought wool from the same party who had sent it to Campbellford to be inspected.

*Held*, further, that the evidence of a usage of the trade as to inspection offered by the company was insufficient, such usage not being shown to have been universal and so well known that the parties would be presumed to have had it in mind when making the contract, and to have dealt with each other in reference to it.

Appeal dismissed with costs.

*Christopher Robinson, Q.C., & Chute, Q.C.*, for the appellants.  
*McCarthy, Q.C.*, for the respondents.

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9 October, 1894.

Ontario.]

ALEXANDER V. WATSON.

*Construction of agreement—Guarantee.*

A., a wholesale merchant, had been supplying goods to C. & Co., when, becoming doubtful as to their credit, he insisted on their account being reduced to \$5,000, and security given for further credit. W. was offered as security and gave A. a guarantee in the form of a letter as follows:—

"I understand that you are prepared to furnish C. & Co. with stock to the extent of \$5,000 as a current account, but want a guarantee for any amount beyond that sum. In order not to impede their operations, I have consented to become responsible to you for any loss you may sustain in any amount upon your current account in excess of the said sum of \$5,000, including your own credit of \$5,000, unless sanctioned by a further guarantee.".....

A. then continued to supply C. & Co. with goods, and in an action by him on this guarantee,

*Held*, affirming the decision of the Court of Appeal, Gwynne, J., dissenting, that there could be no liability on this guarantee unless the indebtedness of C. & Co. to A. should exceed the sum of \$5,000; and at the time of action brought such indebtedness having been reduced by payments from C. & Co. and

dividends from their insolvent estate to less than such sum, A. had no cause of action.

Appeal dismissed with costs.

*Christopher Robinson, Q.C., & Clarke, Q.C., for the appellant.  
Delamere, Q.C., & English, for respondent.*

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9 October, 1894.

Ontario.]

In re HESS MANUFACTURING CO.

EDGAR V. SLOAN.

*Winding-up Act—Contributory—Promoter of company—Sale of  
property to company by—Rescission.*

Two brothers named H., being desirous of purchasing a site for erecting a building in which to carry on the manufacture of furniture, and not having the means to do so, applied to S., father-in-law of one of them, for aid in the undertaking. S. obtained from the owners a conveyance of said site, the consideration being the erection of the building and running of the factory within a certain time, or, failing that, the sum of \$3,000. The building was erected within the limited time and a company having been formed, the manufacturing business was started. S. was one of the provisional directors of the company, having subscribed for shares to the amount of \$7,500, and subsequently the son of S. and the two brothers were appointed directors, through whom S. transferred the property to the company, having previously mortgaged it for \$7,000 (it having cost \$7,300), besides which some \$5,000 had been expended on it, the money being supplied by the wives of the two brothers. On the property being transferred to the company 360 shares of the capital stock, of the value of \$50 each, were allotted to S. as fully paid up shares and to include his former subscription. 234 of these shares were afterwards transferred by S. to his son and daughter. The company having failed, the liquidator appointed under the winding-up act, applied to the master to have S. placed on the list of contributories for the 360 shares. The master complied with this request to the extent of 126 shares standing in the name of S. when the winding-up proceedings were commenced, holding that S. purchased the property as trustee for the company and so gave no value for the shares assigned to him. This ruling

was affirmed by the Divisional Court (23 O. R. 182), but reversed by the Court of Appeal (21 Ont. App. R. 66).

*Held*, affirming the decision of the Court of Appeal, that the circumstances disclosed in the proceedings showed that S. did not purchase the property as trustee for the company, but could have dealt with it as he chose, and having conveyed it to the company as consideration for the shares allotted to him, such shares must be regarded as being fully paid up, the master having no authority to enquire into the adequacy of the consideration.

*Held*, also, that S. was a promoter and as such occupied a fiduciary relation to the company, and having sold his property to the company through the medium of a board of directors, who were not independent of him, the contract might have been rescinded if an action had been brought for that purpose.

Where a promoter buys property for his company from a vendor who is to be paid by the company when formed, and by a secret arrangement with the vendor, part of the price comes, when the agreement is carried out, into the promoter's hands, that is a secret profit which the latter cannot retain; and if any part of such secret profit consists of paid up shares issued as consideration for the property so purchased, they may be treated while held by the promoter, as unpaid shares for which the promoter is liable as a contributory.

Appeal dismissed with costs.

*S. H. Blake, Q. C., and Raney*, for the appellant.

*Moss, Q. C., and Haverson*, for the respondent.

### CONFLICTING EVIDENCE—FUNCTIONS OF THE JURY.

We have been asked to publish the following opinion delivered by the late Mr. Justice Henry, of the Supreme Court of Canada, in *Grand Trunk Ry. Co. v. Wilson*, an unreported case. Mr. Justice Henry's opinion expressed the judgment of the Court.

This is an action brought by the respondent to recover damages for injuries sustained by him by being struck by a locomotive engine of the appellants, at the station of the Vermont Central Railway Company at Saint Johns, in the Province of Quebec. His left arm was lacerated and the bone of it fractured, and it had to be amputated. The defence is in substance

an allegation of contributory negligence of the respondent to such an extent that by law he cannot recover. The principles of law involved are, in my opinion, identical with those decided by the House of Lords in the case of *Dublin, Wicklow & Wexford Railway Company v. Slattery* (L. R. 3 App. Cases, 1155), and the circumstances are also substantially identical. In that case it was decided that "where there is conflicting evidence on a question of fact, whatever may be the opinion of the judge who tries the case, as to the value of that evidence, he must leave the consideration of it for the decision of the jury, and it was held that that was a case that was properly left to the jury, for that where there was contradictory evidence on facts, the jurors, and not the judge, must decide upon them." In that case it was also held that "where notices have been put up by a railway company forbidding persons to cross the line at a particular point, but these notices have been continually disregarded by the public, and the company's servants have not interfered to enforce their observance, the company cannot, in the case of an injury occurring to any one crossing the line at that point, set up the existence of such notices by way of answer to an action for damages for such injury." It is claimed that the weight of evidence as to certain controlling positions in the case was in favor of the appellants, and that the verdict should therefore be set aside. In the case just quoted the evidence on behalf of the company was that of ten against three as to the question of the engineer on approaching the station whistling or ringing the bell. This was the point on which the decision of the case turned, and the finding of the jury was sustained. In this case several witnesses proved the bell of the engine was rung and the whistle sounded, but that was contradicted more fully than in the case referred to, and the jury found in favor of the latter. The plaintiff's witnesses established a clear case of negligence on the part of the engine driver of the appellants, and such as I think it would be unjustifiable in a judge to withdraw from a jury. The jury having decided the issue in favor of the respondent, we are asked to set aside the verdict and order a new trial, or to non-suit the respondent. Have we the right or power to do either, is the next question to be considered?

The evidence shows that the station in question was in the suburbs of Saint Johns, where two streets crossed several shunt-

ing and other tracks of the Vermont Central Railway, that the appellant company had an engine house a short distance from where the respondent was injured, and had from the Central Vermont Railway Company the privilege of using one of their tracks to it. On the occasion in question the driver of one of the locomotives of the appellants proceeded with one of their locomotives in daylight from the engine house toward the station. The respondent was then going from the office of the Central Vermont Company to a warehouse on the other side of the tracks, and distant from one to two hundred yards. Whilst on the same track that the locomotive was using, and with his back toward the point from which the locomotive was coming, he was struck and injured. Contradictory statements as to whether or not he was then on the regular street crossing were made by several witnesses on each side, but the jury did not specifically decide that contested point.

On the question submitted to the jury, "Did the engineer, employees and servants of the defendants so engaged in running the said locomotive \* \* \* over the said line of railway, and while the same was crossing and passing along the said public highway, give due notice of danger by ringing the bell or sounding the whistle of the locomotive, or both, answered "No—sufficient warning was not given." If such was the case, there was then negligence, for the consequences of which the appellants are answerable. It is, however, contended the weight of the evidence was the other way, and that, therefore, the verdict should be set aside. It is a question, however, of the credibility of witnesses, and unless we see that the finding of the jury was the result of improper bias or a clear mistake of the rules of evidence, I do not see how any court could properly set aside such finding. I have said that, in my opinion, the case was properly submitted to the jury. Lord Hatherly, in the case before cited, at p. 1168 says: "I will in the first place state my concurrence with Mr. Justice Barry's opinion in the Court below, viz.: 'When once a plaintiff has adduced such evidence as, 'if uncontradicted, would justify and sustain a verdict, no amount of contradictory evidence will justify the withdrawal of the case from the jury.'" Applying that doctrine to the present case, how can it be contended that there was not sufficient evidence on the part of the respondent, if uncontradicted, to justify and sustain the verdict herein? Then arises the

question whether, the jury having exercised their proper and peculiar functions in deciding upon contradictory evidence, the court can set aside their verdict, even if the verdict was not satisfactory in the view of the court. On this point, in the case referred to, Lord Hatherly says: "I conclude as I began, by saying that I do not hold it to be the office of the judge to weigh or balance conflicting evidence, however strongly the evidence on one side may, in his judgment, preponderate; that question is for the jury." Lord O'Hagan, in the same case, p. 1182, said, in reference to the question of the "whistling": "Ten witnesses for the defendants swore that the whistling occurred in the proper time and in the usual way; three witnesses for the plaintiff swore that, being in a position if it so occurred the sound should have reached their ears, they did not hear it. It is impossible not to be struck by the apparent weight of the defendants' proof. But, as was observed in the Irish Court of Common Pleas, the jury saw the witnesses, and the judge did not condemn the verdict. And whether it was right or wrong the jurors alone were competent legally and constitutionally to decide between the ten who testified on the one side and the three who testified on the other."

"It was urged, and the authority of the eminent judge was vouched to sustain the suggestion, that proof of the want of hearing was no material proof at all. But this seems to me untenable. Assuming that a man stands in a certain position, and has possession of his faculties, the fact that he does not hear what would ordinarily reach the ears of a person so placed, and with such opportunities, seems to me to be manifestly legal evidence, which may vary in its value and persuasiveness, which may in some instances be of small account, and in others be the strongest and the only evidence possible to be offered; but at all events it cannot be withheld from the jury. And if this be so, there was here a conflict of testimony on which the jurymen, *and they alone*, were competent to pronounce."

Lord Selbourne, in the same case, said: "But it seems to me impossible to deny that the evidence of persons who, standing in a position where whistling must have been audible, say they heard none, was proper to be left to the jury on the issue whether there was whistling or not, however strong the affir-

"native evidence might be by which it was met; and the jurors in this case have found that issue in the negative." Again: "If the jury (believing that the usual whistling was on this occasion omitted) entertained the opinion that the deceased came to his death while using the crossing for a legitimate purpose and in a not unusual manner, I cannot say that there was no evidence on which such a conclusion could be founded."

Lord Blackburn, in that case said: "It is said that we encroach on the province of the jury by saying that not to look along the line before crossing it is a circumstance that, unanswered, shows want of reasonable care. I can only answer by citing the language of the judgment in *Ryder v. Wombell*, L. R. 4 Exch. 32, which, I think, is sound law. It is there said, at p. 40: 'We quite agree that the judges are not to determine facts, and, therefore, where evidence is given as to any facts, the jury must determine whether they believe it or not.'"

Lord Gordon, in the same case, said: "I think the weight of the evidence was on the side of the defendants, and that the jury should have so found, but the jurors were the proper arbitrators, and were entitled to decide the point before them as they did."

As to the question of contributory negligence, His Lordship said: "I think the evidence pointed pretty conclusively in one direction, but I think the jurors were the proper persons to deal with the evidence in regard to this issue, as they were in regard to the first, and that the judge at the trial rightly left the decision to the jury. I think a case of disputed facts ought not to be withdrawn from a jury merely because the evidence seems to the judge to point all in one direction. Whether the evidence be strong or conflicting or weak, it is equally the province of the jury to decide upon it, and I think a presiding judge would be arrogating to himself functions not belonging to him if he were, on the trial of a question of fact, to withdraw the evidence from the jury and to decide on it himself."

The judgments I have just quoted from were delivered in 1878, and are the latest I have been able to find. The doctrine laid down I feel bound by, and it is clearly applicable to this case. The jury having expressly found on the two leading points of the case, I consider myself bound by the decision in the case so recently and unequivocally decided, and from which I have

made the foregoing extracts. It was contended that the respondent, when injured, was a trespasser on the track of the appellants, and being so there illegally, he is therefore debarred from recovering damages for the injuries he sustained. I cannot adopt that proposition as at all applicable to the circumstances in this case. It appears from the evidence and the sketches and plans of the station exhibited on the argument that there are no gates or fences to prevent parties crossing the line. There are several railway tracks crossing two streets, and at the station there is necessarily a great deal of traffic and shunting by the two lines operating through it. The public, if not specially invited to do so, have been permitted by the railway officials to cross and recross the tracks at their pleasure, and therefore the appellants substantially, though perhaps only impliedly, undertook to use the necessary caution and diligence to prevent injury to any of the public so crossing the tracks in question. That is, under the circumstances, the necessary legal responsibility undertaken by the railway companies using that station. It may not have been satisfactorily shown that the respondent when injured was really on the public road crossing, as on that point there was conflicting evidence, and the jury did not so unequivocally find as to it.

I consider it, however, unimportant to the decision of this case whether he was on the road crossing or very near to it. The railway companies having permitted the public to cross their tracks, and having no gates or fences at the station, and having their buildings on both sides of the tracks, any one crossing them had good reason to expect the greatest possible care and caution would be observed in the use of those tracks. When the respondent was injured he was going from an office of the Vermont Central Railway Company to their freight depot, which, being on the opposite side of the tracks, required him to cross them. He was on one of the tracks, and upon or very close to the road crossing, with his back toward the direction from which came the locomotive that injured him, and which came from the appellants' engine house a short distance off. The verdict, as I have indicated, negatives, in my opinion, the contention that either the bell of the locomotive was rung or the whistle sounded, and being so there is ample proof of negligence on the part of the appellants' servants. Independently, however, of that finding, we have the fact that neither the engine

driver nor his fireman saw the respondent until after he was struck by the locomotive. It is shown that the speed of the locomotive was slow, so that if a proper look-out had been kept by those in charge of it the respondent might have been warned or the locomotive stopped. The driver said that from the position he occupied on one side of the locomotive he could not see in front of it. I think it was culpable negligence to run a locomotive over the track in question without keeping a look-out ahead. And even had the bell been rung and the whistle sounded, the peculiar position of the track required not only a warning by the bell and whistle to parties crossing it, but the action of the driver himself by stopping the locomotive, if necessary, or by taking any other suitable means of preventing injury. Whether or not the respondent was lawfully on the track where and when he was injured, I think the appellants, under the circumstances, are estopped from saying he was unlawfully there. If, however, he was there unlawfully and as a trespasser on the track of the Vermont Central Railway Company, over which the appellant company had an easement, and the servants of the latter company, by the use of proper and necessary means, could have avoided doing him the injury complained of, the company is answerable for the negligence of its servants when causing the injury through the want of the employment of such necessary means.

For the reasons given, I think the appeal should be dismissed and the judgment below confirmed, with costs in all the courts.

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#### CAT LEGATEES.

Even the most censorious critic must feel a certain amount of respect for the qualities of the heart of Miss Charlotte Rosa Raine, who by her will intended to provide comfortable maintenance for her dumb pets, which had probably solaced many an hour of her own life. Only a lawyer, however, can appreciate the wonderful crop of possible litigation that might have sprung out of the will had her kindly disposition moved her, instead of expressly limiting her gifts to the lives of her pets, to attempt to continue the provision to their progeny. The will makes a number of dispositions which no one can complain of as eccentric, and then, 'as regards her pussies,' she gives her dear old white puss Titiens, and her pussies tabby Rolla, tabby Jennefee, and black-and-white Ursula, to Ann Elizabeth Matthews, and she

directs her executors to pay her 12*l.* a year for the maintenance of each cat so long as it shall live. Her long-haired white puss Louise, and her black-and-white puss Dr. Clausman, she gives to her handmaiden Elizabeth Willoughby, and her black ebony-and-white Oscar to Miss Lavinia Sophia Beck; and her executors are directed to pay them also 12*l.* a year for each of these pussies so long as they shall live. All the remainder of her pussies she gives to the said Ann Elizabeth Matthews, and she directs her executors to pay her out of the balance of the dividends of her father's Lambeth Waterworks shares 150*l.* a year for their maintenance so long as any of them shall live, '*but this is not to extend to kittens afterwards born.*' There is also a direction to Ann Elizabeth Matthews to live out of this annuity in the village of Haylands (or elsewhere) in a cottage and garden for the maintenance of the said pussies, unless the Rev. William Martin Spencer is willing to permit the pussies to reside on the premises and in the garden at Pound.

There is an exquisite finish and roundness given to the bequest by that '*not to extend to kittens afterwards born.*' The mind is almost unequal to grapple with the difficulties that would have arisen if, instead of this sweeping exclusion of all after-born kittens, she had, say, in the case of 'dear old' Titiens given the annuity in favour of Titiens for life, and after her death to all her kittens who should survive her. The first difficulty that strikes us is that 'kittens' is not a term which has any legal significance like 'issue' or 'children,' but probably the Court, dealing with a case of first impression, would feel itself constrained to hold that the term would not include 'grandkittens' or 'great grand-kittens.' There, however, would appear to arise a still greater difficulty. A gift to the 'children' or 'issue' of an individual *prima facie* means only the legitimate children or issue of that person. Could the claimants under the class of 'kittens of Titiens' contend to have their rights admitted under any inferior standard to that of legitimacy? If not, then by what expert evidence as to cat law, fortified by what oral testimony as to facts, could it be established that the issue of 'dear old Titiens' was born in cat-wedlock so as to answer the description according to the exacting standard of the English law of 'kittens afterwards born?' From these and many other deep and subtle difficulties we are saved by the merciful interposition of the words '*but this is not to extend to kittens afterwards born.*'—*Law Journal* (London).

# THE LEGAL NEWS.

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VOL. XVII.

DECEMBER 1, 1894.

No. 23.

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## CURRENT TOPICS AND CASES.

The Queen's Bench Division, Ontario, in *R. v. Plowman*, 19 November, 1894, quashed a conviction for bigamy where the second marriage took place in a foreign country, and there was evidence that the defendant, who was a British subject, resident in Canada, left Canada with the intent to commit the offence. The provisions of sect. 275 of the Criminal Code make such a marriage an offence, the first clause reading as follows:—"Bigamy is (a) the act of a person who, being married, goes through a form of marriage with any other person *in any part of the world*." This is modified by Sub-sect. 4: "No person shall be liable to be convicted of bigamy in respect of having gone through a form of marriage in a place *not in Canada*, unless such person, being a British subject resident in Canada, leaves Canada with intent to go through such form of marriage." The Court held that the provisions of the Code are *ultra vires* of the Parliament of Canada. The case of *Macleod v. Atty. General for New South Wales* [1891] A. C. 455; 14 L. N. 402, was followed. See also the authorities cited in Taschereau on the Criminal Code, p. 280; Crankshaw, p. 211.

The constitutionality of Sunday laws has been contested in several States of the Union. A body small in numbers but active in supporting their creed, called Seventh Day Adventists, take the ground that there is no scriptural authority for the substitution of Sunday for the Jewish Sabbath. They declare the observance of the latter to be still binding on their conscience, and they deny the right of states and governments to make laws compelling the observance of a different day. This question has been decided adversely to their pretensions in two recent cases, *People v. Bellet*, 22 L. R. A. 696, and *Judefind v. State*, ib. 721, the former by a Michigan Court and the latter by a Maryland Court. From a note to this case it appears that the former decisions on the subject, with the exception of one or two early cases which have been overruled, are unanimous in supporting the constitutionality of the Sunday laws.

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Our Court of Appeal, in the November term, heard appeals in ordinary course, from decisions which had been delivered on the last day before the long vacation. This shows that the arrears which have existed in this court for twenty years have actually disappeared, and there is little doubt but that in future the Court will clear the roll every term. This change in the condition of things may make it necessary for the Court to adopt a rule requiring one factum at least to be filed before the cases are put on the list for the term, as at present considerable confusion results from the fact that the list is encumbered with many cases in which there is no intention to proceed during the term. Thus, in November, there were so few cases ready that on the first day of the term, the thirty-second and thirty-third cases on the list were heard.

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"*The Barrister*" is the name of a new law journal published at Toronto, of which the first number appears

in December. The contents are of a more general character than usually found in professional journals, even the department of "sports" not being overlooked. Several of the articles are interesting,

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#### COLONIAL JUDGES AND THE PRIVY COUNCIL.

We cordially assent to the proposal, which is now receiving considerable attention in legal circles, that our great Australasian, American, and African colonies should no longer remain unrepresented in the Judicial Committee of the Privy Council. That in the colonies to which we have referred the decisions of the Judicial Committee as at present constituted are regarded with anything but the respect to which they are entitled we do not for one moment believe. Nor is there any ground for the allegation which some in their haste have made, that the admission of colonial judges to the Privy Council ought to have been conceded long ago. Indian jurisprudence was so technical and peculiar in character that the presence of experts with local knowledge of it in what was to be the Supreme Court for Indian appeals was obviously indispensable. But the various systems of colonial jurisprudence that the Privy Council had to administer stood on an entirely different footing. The development of colonial law closely followed the development of our own law, and its departures from the English standard were not of serious importance. Moreover, the great fundamental *genera* of which all systems of jurisprudence are species have long been fully represented in the Judicial Committee. Our Indian judges supplied the board with the knowledge of Hindu and Mohammedan law necessary to enable it to determine appeals not only from India, but in later times from Cyprus and our various consular Courts in the Levant. The Scotch legal members of the Judicial Committee—foremost among whom stands the commanding figure of Lord Watson—represented the French and Roman-Dutch colonies with great fidelity; while colonial legal systems of strictly English descent had their representatives in the English judges, of whom the majority of the Judicial Committee is composed. The time, however, has now come when the constitution of the Judicial Committee needs to be revised from the colonial standpoint. In Canada, in Australasia, in South Africa, problems are arising, and legislative departures are being taken for which

there are no counterparts or prototypes in English legal or social life; and these great possessions of the English Crown are entitled to claim a voice in the ultimate decision of the issues to which they give rise. The bold and statesmanlike precedent set by Lord Rosebery of appointing a colonial clergyman to an English bishopric ought to be followed on the earliest possible occasion by the transfer of an Australian judge to the Privy Council. The Australasian colonies have the first claim to an appointment of this kind. But the turn of Canada and South Africa will come next. It is to be hoped that this desirable reform will not be prejudiced by the foolish suggestion that colonial judges should occasionally be promoted to the Bench of the English Supreme Court. It will be time enough to embark on an enterprise of this kind when colonial lawyers are willing to see their English brethren appointed over their heads to vacancies on the colonial Bench. And apart altogether from such considerations, English practice is too technical a science to be mastered by a judge after his elevation to the Bench. There is, however, an unanswerable case for the main demand which our greater colonies are now putting forward; and while the reform of the Privy Council is in the air, we hope that the need for a revision of the absurd practice by which one member of the Judicial Committee pronounces the decision of the whole body, and no corroborating or dissenting voices are heard, will not be ignored. The effect of this procedure is to detract from the authority of the Judicial Committee without adding anything to its dignity.—*Law Journal (London.)*

#### QUEEN'S BENCH DIVISION.

LONDON, Oct. 29, 1894.

TAYLOR v. REGINAM (IN ERROR.) 29 L. J.

*Writ of Error—Indictment for Obtaining Goods by False Pretences Counts for Receiving the Same—Omission of Particulars of False Pretences—7 & 8 Geo. IV. c. 29, s. 55; 24 & 25 Vict. c. 96, s. 95.*

A writ of error having been issued in this case, on the application of Taylor to the Recorder of the borough of Portsmouth, a return was made from which it appeared that at the borough quarter sessions, held in January, 1894, an indictment had been found against one Farrell for obtaining certain pieces of meat

from one Joshua Clarke and George Walter Peel by false pretences which were duly set out in the first and second counts. In the third and fourth counts Taylor was charged with receiving similarly specified pieces of meat 'well knowing the same to have been unlawfully, &c., obtained from the said Joshua Clarke by false pretences,' but no further particulars of the false pretences were set out. The fourth count repeated the charge in the same form, merely substituting George Walter Peel for Joshua Clarke. Farrell pleaded 'Not guilty,' but Taylor demurred to the counts of the indictment as against himself for receiving. The Recorder overruled the demurrer, and, Taylor having refused to plead, ordered a plea of 'Not guilty' to be entered. Both defendants were convicted. The Recorder postponed judgment in regard to Taylor until the April quarter sessions, when he sentenced him to three years' penal servitude.

Error was assigned on the ground that in the third and fourth counts of the indictment the false pretences were not set out, and that the false pretences, by means of which the goods were alleged in these counts to have been unlawfully obtained, were not stated to be those by which Farrell in the first and second counts was alleged to have obtained the goods, and, therefore, that the indictment was not sufficient to warrant the judgment. The master of the Crown Office joined issue on the errors assigned.

C. W. Mathews and Guy Stephenson appeared for the plaintiff in error. They relied on *Regina v. Hill* and *Regina v. Wilson*, cited in 'Russell on Crime,' vol. ii. (4th edit.), 554; and *Regina v. Goldsmitt*, 42 Law J. Rep. M. C. 94; L. R. 2 C.C.R. 74.

Temple Cooke and G. T. Warry appeared for the Crown. They cited *Regina v. Rynes*, C. & K. 326; *Regina v. Gill*, 2 B. & Ald. 204; and *Regina v. Aspinall*, 46 Law J. Rep. M. C. 145.

The Court (MATHEW, J., and CHARLES, J.) held that the gist of the offence charged was the receiving of the articles with a guilty knowledge that they had been unlawfully obtained by some false pretence; that it was not necessary, therefore, to set out the particulars of the false pretence any more than it would be in a count for conspiring to obtain goods by false pretences, as was laid down in *Regina v. Gill*; and that so long as all the ingredients of the offence necessary to be proved were set out, as they were in these counts, the indictment was good.

Judgment for the Crown.

## JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

LONDON, November 17th, 1894.

*Present* :—LORD HOBHOUSE, LORD MACNAGHTEN, and SIR  
RICHARD COUCH.

THE QUEBEC CENTRAL RAILWAY CO. V. ROBERTSON.

*Agreement—Interpretation of.*

This was an appeal from a judgment of the Court of Queen's Bench for Lower Canada, in the Province of Quebec, of April 26, 1893, reversing a decision of Mr. Justice Brooks. <sup>(1)</sup>

The arguments were heard prior to the vacation before a Board consisting of Lord Watson, Lord Hobhouse, Lord Macnaghten, and Sir Richard Couch, when their Lordships reserved judgment.

*Mr. Finlay, Q.C.*, and *Mr. Gore*, appeared for the appellants; *Sir Edward Clarke, Q.C.*, and *Mr. J. Elden Bankes*, for respondent.

SIR RICHARD COUCH :—By an Act 49-50 Vict., c. 82, of the Legislature of the Province of Quebec, passed on June 21, 1886, the charter of the Quebec Central Railway Company was amended by authorizing the provisional directors of the company to issue 3,000 prior lien bonds of £100 sterling each, payable in 20 years, to be a first charge on the property of the company, and providing that upon the coming into force of the Act the powers of the directors should cease and the affairs of the company be administered by a board of provisional directors, consisting of the persons named therein, until a permanent board of directors should be elected as was provided. The Act was to come into force by proclamation of the Lieutenant-Governor, to be issued on a declaration of the company that it was assented to by two thirds of the shareholders to be given before June 1, 1888. In order to ascertain the condition of the company prior to the passing of the Act, Mr. Thomas Swinyard had been employed to examine the books of the company, as well as the railroad, and to report thereon. In December, 1885, he made a report, in which he showed that the direct liabilities of the company, apart

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<sup>(1)</sup> The judgment of Mr. Justice Brooks is reported in 14 L. N. 354, and the judgment of the Court of Queen's Bench in R. J. Q., 2 B. R. 273.

from the bonded debt of which the interest had been guaranteed by the Provincial Government, but which guarantee had expired or was about to expire, were \$113,285.66; of which \$50,000 were estimated to be due on a claim of the Ontario Car Company for the price of rolling stock for which the railway had been attached on a judgment in favor of the Ontario Car Company; \$22,677 as due to James Ross and company on what might be termed the locomotive account, being the price of locomotives bought by James Ross and held by him but used by the company; and \$40,608.66, other liabilities, as per balance-sheet of August, 1885, accompanying Mr. Swinyard's report, and certified to by Mr. Power, accountant, being accounts due to tradesmen for supplies, advertising and amounts due to other railroads on traffic account. Negotiations were entered into for a settlement of those claims, with a view of obtaining legislation and possession of the railway, of which the Honorable Mr. Robertson, who was a large shareholder and had control of the stock, was then president, and a Mr. Woodward was the manager. On October 9, 1885, pending the investigation by Swinyard, Woodward made in England a statement of the affairs of the railway. The negotiations were between Mr. Hall, one of the provisional directors in Canada, and Mr. Robertson, and were communicated by Mr. Hall to the directors who were in England, on March 27, 1886, with a view to prevent legal proceedings by which the bond-holders in England would endeavour to foreclose the mortgage and take possession of the railway. After the lapse of a considerable time, on April 2, 1887, an agreement was made in England between Mr. Robertson and his co-directors, of whom the majority were in England, of the one part, and Mr. Robertson individually of the other part, represented by Mr. Hall, who was then in England. The agreement was provisionally signed by Hall for Robertson, and was afterwards ratified by Robertson. The question in appeal arises upon that agreement.

It recited the Act and the power to issue the 3,000 prior lien bonds and that certain debts set forth in the first and second parts of the first schedule to it were due or claimed from the company, and proceeded as follows:—"And whereas the Hon. J. G. Robertson, who is the chairman of the company, has agreed to settle and discharge all the said debts for the sum of \$250,000 to be provided in the manner hereinafter mentioned, and whereas the parties of the first part are mentioned in said Act as the

board of provisional directors of said company upon the coming into force of said Act, it is deemed necessary that formal declaration and agreement should be made on their part that they will take the necessary steps to provide the said sum of \$250,000, and subject to the conditions hereinafter named will provide or pay over the same to the said J. G. Robertson as follows: 1st. That they will with all possible despatch after the coming into force of the said Act cause the prior lien bonds designated in said Act to be executed in the form of the second schedule hereunder written and deliver 588 thereof to the Hon. George Irvine, Judge of the Court of Vice-Admiralty, residing in the City and Province of Quebec, to be held by him under the conditions hereinafter expressed." 2nd. After providing for the payment or deposit of cash in lieu of the bonds, which was not done, the agreement said that the cash or bonds should be administered by Mr. Irvine as follows:—"Upon the said Hon. Joseph Gibb Robertson delivering to the said Hon. George Irvine, a statutory declaration made by himself, by James Robertson Woodward, and by the present auditor of the said Quebec Central Company, to the effect that the liabilities mentioned in a list to be annexed thereto and corresponding with the list contained in the said first schedule hereto comprise all the debts due and claimed from the said company (other than liabilities for working expenses of the railway incurred six months before the coming into operation of the Act), and all the liabilities of the contractors which arose from or were connected with their contracts for the construction and the equipment of the said railway, and stating whether, and, if any, what part of the receipts of the company have been used for the liquidation of any principal or interest in respect of the said debts enumerated in the second part in the said first schedule, then said Hon. George Irvine may pay over and deliver to the said Hon. Joseph Gibb Robertson the said cash or bonds, as the case may be, upon the said Hon. Joseph Gibb Robertson procuring and delivering up to said Hon. George Irvine, complete discharges from the said several debts due or claimed as mentioned in said schedule, or an amount of said cash or bonds from time to time in the proportion which the discharges produced shall bear to the total liabilities mentioned in the said schedule. Provided, however, that the said Hon. George Irvine shall retain and pay to the company, in cash or in bonds, a sum equal to so much of the receipts of the company as shall appear from the

said declaration, to have been used in liquidation of any principal or interest in respect of any of the debts enumerated in the second part of the said first schedule. 3rd. In consideration of the premises the said Hon. J. G. Robertson hereby indemnifies the company against all liabilities and claims upon the company other than (a) the bonded debt of the company, (b) the liabilities of the company for the satisfaction of which article 4 provides, and (c) liabilities for working expenses of the railway incurred within six months before the coming into operation of the Act."

The Act was proclaimed on November 3, 1887, Mr. Woodward remaining their manager. On November 14, 1888, Mr. Walsh, auditor of the company, made a statutory declaration that the \$40,608.66 had been paid, except \$54.18, but not stating by whom or when. It appeared that that payment had been made out of the earnings of the railway from time to time between August 31, 1885, and August 14, 1887, nearly all of it in 1885 and 1886. Statutory declarations were also made about the same time by Mr. Robertson, Mr. Woodward and Mr. Walsh, stating that the sums mentioned in the lists attached thereto comprised all the debts due and claimed from the company on August 31, 1885, other than the bonded debt and the debts excepted with it in the agreement, and that only \$3,273 odd had been paid out of the earnings of the road on what were termed contractors' liabilities since April 2, 1887. On those declarations and certain vouchers as discharges being given to Mr. Irvine, he, in November and December, 1888, handed over to Mr. Robertson or to Mr. Woodward, who transacted his business, 534 bonds, retaining eight to cover the \$3,273 odd paid from earnings on contractors' liabilities, and leaving 46 in his hands. On March 30, 1889, Mr. Robertson brought an action against Mr. Irvine, alleging that, in pursuance of the agreement, he had paid the larger portion of the outstanding debts referred to in it, and had delivered to the defendant the statutory declarations required by it, and had received from the defendant a number of bonds from time to time in the proportion which the discharges produced bore to the liabilities mentioned in the schedule; that in or about January, 1889, he delivered to the defendant discharges for an amount of the liabilities which would entitle him to recover and receive from the defendant 43 of the bonds, which the defendant refused to deliver, although duly requested to do so; that since January 31, he paid liabilities and delivered discharges

to the defendant which would entitle him to three additional bonds, which the defendant also refused to deliver to him; and he prayed that the defendant might be ordered to deliver to him 46 of the bonds, or in default to be condemned as his debtor in the value thereof.

The defendant appeared but did not plead, and subsequently deposited the bonds in court. On April 30, 1889, the Quebec Central Railway Company filed a petition in intervention, and having been allowed to intervene, stated in their grounds of intervention that previously to April 2, 1887, the day of the execution of the agreement, the debts mentioned in the first part of the first schedule to it had been in a large measure settled and paid by the company out of its own revenues; that between April 2 and November 3, 1887, the company paid all its debts; and, after the coming into force of the Act, large sums, exceeding \$30,000, were taken from the funds of the company and expended in the payment of debts which the plaintiff was bound to pay.

The summary of the plaintiff's answer to that was given in the reasons of Mr. Justice Brooks for the judgment in the Superior Court. He says: "Plaintiff, on the other hand, says, 'it is true a large amount was paid out of the earnings of the road, but I had a right to pay it so, and am entitled to the benefit of it. You were aware of it, and acquiesced in it and ratified it; your manager here, Mr. Hall, consented to it, and you cannot complain. It was a going concern. I as president had a right and was bound to pay from earnings, pending negotiations and during the long delays, on account. You knew it. I only agreed to procure discharges of these debts, and I agreed to indemnify you against all claims except certain claims mentioned in the agreement. I abide by my agreement, and there are now other claims—notably that of commercial taxes, amounting to upwards of \$18,000—which you call upon me to pay.'"

A difficulty arose from the statement of Mr. Swinyard of liabilities on August 31, 1885, having been made the basis of the agreement in April, 1887; but that could not alter the meaning of the words in the agreement that Mr. Robertson had agreed to settle and discharge all the debts set forth in the first schedule, which was the consideration for his having the bonds delivered to him. The intention of the parties was that Mr. Robertson should take upon himself personally the settlement and discharge

of those debts. Payment with the funds of the company, and delivering to Mr. Irvine discharges obtained by such payments, was not performance by Mr. Robertson of his agreement or indemnifying the company against these debts, which he expressly agreed to do. The consent of Mr. R. N. Hall, the manager in Canada, would not make any difference, as he had no power to alter the agreement or dispense with the performance of it. Their lordships are of opinion that the plaintiff failed to show that he was entitled to the 46 bonds, and that the action was properly dismissed in the Superior Court by Mr. Justice Brooks; and, his judgment having been reversed by the Court of Queen's Bench for reasons with which their Lordships cannot agree, they will humbly advise her Majesty to reverse the judgment of that court, and order that the appeal to it be dismissed with costs, and to affirm the judgment of the Superior Court. The respondent will pay the costs of this appeal.

[In the Courts below the Attorneys were: Messrs Brown & Morris, for plaintiff; Messrs Hurd & Fraser, for intervenants, and Messrs Cook and Fitzpatrick, counsel.]

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### *THE TRUE PROFESSIONAL IDEAL.*

Mr. John F. Dillon, the well known author, read a paper bearing the above title, before the Section on Legal Education of the American Bar Association, in August last. The article deserves the careful perusal of all students as well as teachers of law.

I have been honored with an invitation to read before the section on Legal Education a paper on "The True Professional Ideal." with the implication, I presume, that it should have some relation to the subject of legal education in one or more of its many aspects.

The time-limit of thirty minutes will not enable me to do more than to glance hurriedly at one or two of the more important questions that might fitly be considered under the general title of "The True Professional Ideal." It can never, I think, be entirely out of place,—certainly, in my opinion, it is not out of place at the present time,—to impress upon the bar and society the essential dignity, worth, nobility and usefulness of the lawyer's calling. The true conception—ideal, if you please, of the lawyer, is that of one who worthily magnifies the nature and duties of his office, who scorns every form of meanness or disre-

putable practice, who by unwearied industry masters the vast and complex technical learning and details of his profession, but who, not satisfied with this, studies the eternal principles of justice as developed and illustrated in the history of the law and in the jurisprudence of other times and nations so earnestly that he falls in love with them, and is thenceforward not content unless he is endeavoring by every means in his power to be not only an ornament but a help unto the laws and jurisprudence of his State or nation. In his conception, every place where a judge sits, although the arena be a contentious one where debate runs high and warm, is yet over all a temple where faith, truth, honor and justice abide, and he one of its ministers. With what majestic port may not the lawyer approach that temple when he reflects that he enters there not by grace but of right, craving neither mercy nor favor, but demanding justice, to which demand the appointed judicial organs of the state must give heed under all circumstances and at all times.

There is, I fear, some decadence in the lofty ideals that have characterized the profession in former times. There is in our modern life a tendency—I have thought at times very strongly marked—to assimilate the practice of the law to the conduct of commercial business. Between great law firms with their separate departments and heads and subordinate bureaus and clerks with their staff of assistants, there is much resemblance to the business methods of the great mercantile and business establishments, situate close by. The true lawyer—not to say the ideal lawyer—is one who begrudges no time and toil, however great, needful to the thorough mastery of his case in its facts and legal principles; who takes the time and gives the labor necessary to go to its very bottom; and who will not cease his study until every detail stands distinct and luminous in the intellectual light with which he has surrounded it. The temptations and exigencies of a large practice make this very difficult, and the result too generally is that the case gets only the attention that is convenient instead of that which it truly requires. The head of a great firm in a metropolitan city, a learned and able man, was associated with another in a case of much complexity and moment. He expressed warm admiration of the printed argument of his associate counsel, which had cost the latter two months of laborious work, adding, however, that *he*

could not have given that much time to it because commercially regarded it would not have paid him to do so.

It is unquestionably the duty of the profession to preserve the traditions of the past—to maintain its lofty ideals--and to this end to guard against what I may perhaps truly describe by calling it the commercializing spirit of the age. The utterance of Him who spake with an authority greater than that of any lawyer or judge—"Man lives not by bread alone," should never be forgotten or unheeded by the lawyer, and will not be by any who comes within the category of what may be termed the "ideal lawyer."

Mr. J. H. Benton, jr., of the Boston bar, under the conviction that few persons even of the profession realized the full extent in which the bar has participated in the government of this country and given direction to its policies and public affairs, read before the Southern New Hampshire Bar Association, in February of the present year, a most instructive paper on the "Influence of the Bar in our State and Federal Government."

A few of the facts which he has laboriously ascertained and stated may be here briefly mentioned as bearing upon the subject of the present paper. Of the 56 signers of the Declaration of Independence, 25 were lawyers, and so were 30 out of 55 members of the convention which framed the Federal constitution. Of the 3,122 senators of the United States since 1787, 2,068 have been lawyers; of the 11,889 representatives, 5,832 have been lawyers. "The average membership of lawyers in both branches of Congress from the beginning has been 53 per cent." In the present constitutional convention of the State of New York, 133 out of 175 members are members of the bar. Lawyers constitute, as nearly as can be ascertained, one in every four hundred of the male population of the United States at the present time. The statistics show with one exception that in the legislatures of all the States, the legal profession has, and always has had, a membership excessively greater in proportion to its number in the population of the State.

Not less marked is the influence of the bar in the executive departments of the Federal and State governments. Of the 24 presidents, 19 have been lawyers, and Mr. Benton states that "of the 1,157 governors of all the States, 578 of the 978 whose occupations I have been able to ascertain have been lawyers."

It is scarcely necessary to mention the fact that the entire

body of the other co-ordinate department of the national and State government—the judiciary—have been members of the profession. And in our polity the judiciary have a power and are clothed with a duty unique in the history of the governments, viz., the power and duty to declare legislative enactments and executive acts which are in conflict with our written constitution, to be for that reason void and of no effect. In this America has taught the world the greatest lesson in government and law it has ever learned, namely, that law is not binding alone upon the subject and that the conception of law never reaches its full development until it attains complete supremacy in the form of written constitutions, which are the supreme law of the land, since their provisions are obligatory both upon the state and upon those subjected to its rule, and equally enforceable against both, and therefore *law* in the strictest sense of the term.

Two forces in society are in constant operation and are necessary to its welfare, if not to its very existence: the conservative force, to preserve what is worth preserving; the progressive, without which we would have stagnation and death. The character and state of the law as well as the social condition of any people is the result of the conflict between these healthful although antagonistic forces. As the ocean keeps itself pure by the constant movement and freedom of its waters, so the like movement and freedom are necessary to preserve what is good in existing conditions and to remedy what is either bad or inadequate.

Changes in the law of any living and progressive society are, therefore, absolutely necessary in order to make the law answer the current state and necessities of the social organism. So far as law is expressed in written form, whether in constitution or statutes, it is crystallized and almost although perhaps never quite, stationary. Owing to the doctrine of judicial precedent as it exists in our system, this theoretically makes what is adjudged to be law almost, although in practice not quite, as stationary as law in written form. True wisdom requires that law shall from time to time and with all convenient speed be made to harmonize with existing social needs. This makes law amendment or reform a constant, continuing and ever existing necessity.

It is pertinent here to observe that nothing is more difficult than the work of law improvement. It requires a knowledge of the law both theoretical and practical; theoretical, so as to know

the relation of each department of the law to every other department; practical, so as to appreciate existing defects and the needed remedy. Doctrinaires, jurists, and legal scholars may see, indeed are often the first to see, or to suggest and urge the required changes, but are, generally speaking, incapable of wisely effecting them. With the notable exception of the changes wrought in the law of evidence, Bentham's vast labors bore almost no direct fruit. Austin filled for many years a large space in the field of jurisprudence. My own judgment is that his legal theories have proved to have little intrinsic or permanent value. Though feeling constrained to say this, I must also add that, in my opinion, the world is much indebted to these eminent men for their bold and free criticisms of our laws and for arousing the attention of the bar to the need of amending them, and especially for making some portion at least of the profession in England and this country feel the need of a more scientific jurisprudence. Brougham, Mackintosh, Romilly and Langdale were in a way the disciples of Bentham and Austin, and labored faithfully in the cause of law reform in England. But they went about it in the conservative and timid manner so characteristic of the English mind. Their efforts were confined to single, sporadic, specific ameliorations of certain felt grievances, but their labors proceeded upon no scientific plan to effect comprehensive reforms of either substantive law or of the law of procedure.

Such, roughly sketched, was the general condition of law reform when the late David Dudley Field entered upon the work of law amendment in this country. It seems to me that the career of Mr. Field illustrates several phases of the subject under discussion. For this reason as well as because it is proper that some notice should be taken in this body of the labors of this eminent man, at one time the president of this association, I shall refer for a few moments to the main work of his life and endeavor to draw from it the lessons it teaches. In my judgment, no mere doctrinaire or closet student of our technical system of law is capable of wise and well-directed efforts to amend it. This must be the work of practical lawyers. Mr. Field had this needed qualification for he was throughout his long career at the bar a busy and active practitioner.

When Mr. Field commenced his work of law improvement, the gap between the law as it existed and what the welfare of the

community required, especially in the law of procedure, was very wide. The system of pleading and procedure had grown to be so technical as to defeat in many cases the cause of justice. This was eminently true of the common law system of pleading and procedure, and even the system of equity was equally open to the reproach of undue technicality and of intolerable delays. The need for a cheaper, simpler, and more expeditious procedure at law and in equity had become a crying want. Mr. Field, if he did not originate the idea, clearly put himself at the head of the movement to remedy the evil. This he did at an early stage in his professional life, and to this as well as to the codification, looking to improvement in criminal law and procedure, as well as in substantive law, he gave without ceasing, being instant in season and out of season, more than fifty years of his active career. He advocated the principle of codification everywhere. He was a man of strong feelings and convictions. Every man of real force is so, almost necessarily. He, therefore, fought for codification; and he fought with dauntless courage everybody who opposed him. We may think that he unduly estimated the scope, the value and the beneficence of codification. He may have done so. Effective and true reformers are apt to go too far. But this detracts not the least from the estimation in which he is justly entitled to be held by the bar and the public. I do not wish to surround him with a haze of golden panegyric. He does not need it. Look at his public labors in municipal and international law, extending from 1839 to 1894, and what lawyer in this country, dead or living, has ever dedicated half as many years as he to conscientious and unselfish efforts to improve our laws and jurisprudence? In this view he stands without a peer. Consider the successes which have crowned his work in this country, in England and in the English colonies, and his career is strikingly distinctive. It dominates our legal landscape. True, some of his schemes of law amendment failed of adoption, those more especially relating to the codification of the common law, but he seized upon one principle which he made eminently successful and which in turn made him famous and justly so, namely, the simplification of the law of procedure. The New York Code of 1843, in substance or principle, Mr. Field lived to see adopted in a large majority of the States and territories of the Union, and in the Judicature Act of 1873 of the British Parliament.

[Concluded in next issue.]

# THE LEGAL NEWS.

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VOL. XVII.

DECEMBER 15, 1894.

No. 24.

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## *CURRENT TOPICS.*

The necessity, if necessity there be, of bringing back the Circuit Court to the Court House, in Montreal, is much to be regretted, for the result will be that the access to all the other courts and offices will be greatly obstructed. The elevators are already insufficient for the work they have to do, and if they are used by the immense concourse of people attending continuous sessions of the Circuit Court in two divisions, it is difficult to imagine how any one else is to profit by them. The work of the Circuit Court in Montreal is important enough to have a building devoted to its exclusive use, and in any case it is undesirable that there should be but one access for the very large number of persons who are daily compelled to attend the civil courts. The late Chief Justice Johnson several times complained openly of the uncere-  
monious manner in which the judges were hustled by the crowd, on their way to chambers. This particular inconvenience is not likely to diminish in the future, but it is sufficient at present to point out the much greater inconvenience that will be caused by the difficulty and loss of time in reaching the library and courts on the upper floors.

A correspondent, in reference to the paragraph on p. 354, about business in the Court of Appeal, points out that the Act, 54 Vict., ch. 48, s. 2, makes it obligatory on the clerk of the court to put the case on the roll, without waiting for a factum. Art. 1132 in the new Chapter 1 of Book IV, of the second part of the Code, as enacted by the above mentioned Act, reads as follows:—"As soon as the parties have filed their appearance, or after the delay to file the same has expired if only one party has appeared, the case is set down upon the roll by the clerk of appeals, *and is heard in its turn.*" This, apparently, prevents the exclusion from the printed list, of cases in which no factum has been filed, as was the practice formerly. The change is to be regretted, as it is obviously in the interest of the bar that the printed list should convey some idea of the cases that are likely to come on from day to day. At present the list is practically useless, and the result is that counsel who have cases to attend to in several courts are frequently taken by surprise when a case a long way down on the printed list is called in their absence.

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The proposition to admit graduates of law faculties to practice on the presentation of their diplomas is not one which commends itself under the circumstances existing in this province. If the profession were divided as it is in England the change would perhaps not be so dangerous if it applied to barristers only. Incompetent barristers would not get anything to do, because the attorneys on whom they would be dependent for briefs would be able to discern their uselessness. But as regards the profession of attorneys it cannot be pretended that there should be any relaxation of the checks upon admission. The public, a large proportion of whom are unable to detect ignorance in their legal advisers, need to be protected against incompetence which may have disastrous conse-

quences, and the best safeguard is the examination held by the duly authorized representatives of the whole profession.

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The death of the premier and minister of justice of Canada, on the 12th instant, has been the occasion of such general comment that it is not proposed at present to refer particularly to the unexpected event. We shall merely reproduce the observations made by Acting Chief Justice Tait on the 18th December, at the opening of the December Term of the Court of Review :—

"Yesterday the citizens of this city and country were greatly shocked by the report of the sudden death of Sir John Thompson, K.C.M.G., premier, minister of justice and attorney-general of this Dominion. The confirmation of this report imposes upon us the sad duty of expressing our sincere grief at the loss of one of Canada's most distinguished sons. He had attained great eminence as a lawyer and a statesman in his native province, when at the early age of thirty-eight he ascended the Bench of the Supreme Court of that province. As might have been expected, his career upon the Bench was a brilliant one, and in the discharge of the duties of the important positions which he afterwards filled he displayed talents of the highest order.

"Within the sphere of his functions fell, to a very large extent, the superintendence of affairs connected with the administration of justice and the preparation of important legislation, and we think all will unite in according him a high place in the roll of our most eminent jurists.

"His death, at the early age of fifty, just after receiving further marks of honor and confidence from his Sovereign, is particularly sad.

"While we deplore his loss on our own account, our hearts will go out in sympathy to his much bereaved family. We propose as a mark of respect to his memory, and in recognition of the valuable services he has rendered to his country, to close our courts, except for matters of urgency, on the day which may be fixed for his interment. At the present moment there are so many divisions of the court sitting, and so many witnesses in attendance, that great loss and inconvenience would result to suitors were we to adjourn for a day.

"In thus performing our duty to the living, we are satisfied that we are carrying out what would be his desire, and are but following the example of one who was always faithful in the discharge of his duties."

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Political exigencies, according to the *London World*, are not unknown even in the greater world of imperial concerns as affecting judicial appointments. The journal

mentioned says :—" Mr. Justice Barnes is in such a state of health that there is no chance of his being able to resume his duties, but his retirement is being deferred (to the great inconvenience of his colleagues) because Mr. Gully has Lord Herschell's positive promise of the next vacancy on the Bench. It is known, however, that if Mr. Gully vacates Carlisle the Unionists will win the seat, so it is proposed to postpone the retirement of Mr. Justice Barnes until Parliament is dissolved. So equivocal an arrangement requires no comment of mine."

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The Supreme Court of Illinois, in *People v. Williams*, 145 Ill. 573, has decided that a mandamus should be granted to compel a person who has been appointed to a municipal office, and who is qualified for the same, but refuses it, to accept it and enter upon the discharge of its duties, although a statute is at the time in force imposing a penalty for non-acceptance.

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The late Norman L. Freeman was for 31 years reporter to the Supreme Court of Illinois, in which time he reported and published 120 volumes of the decisions of that court. Mr. Freeman was a very careful reporter, but his head notes are considerably longer than those prepared by the majority of reporters.

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An extremely useful little book has just been issued from the press (Canadian Appeals, Toronto, The Carswell Co., Publishers), prepared by Mr. C. H. Masters, assistant reporter of the Supreme Court of Canada. It is a collection of Canadian cases appealed to the Judicial Committee of the Privy Council, and also the reported cases carried to the Supreme Court of Canada. We have often wished to have such an index at hand, but have never been able to find time to make it ourselves. Mr. Masters deserves cre-

dit for undertaking so useful a compilation. The only cause of regret is that he has not included in his list all the cases taken to the Supreme Court of Canada, whether previously reported or not, and in the event of a new edition being called for we trust this useful extension of the list will be made.

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*LA LÉGENDE DE MGR. SAINT YVES, PATRON  
DES AVOCATS.*

La fête du saint patron du barreau se célèbre le 19 mai. Le monde du Palais nous saura gré de rappeler les circonstances qui lui valurent cette haute distinction.

En ce temps-là, le Bâtonnier des avocats d'un barreau de Bretagne, l'histoire ne dit pas si c'était celui de Dol ou de Guimperlé, de Rennes ou de Guérande, assembla son conseil de l'Ordre et dit : "Toute jurande, mes très-chers confrères, a son patron là haut, et son histoire aux célestes archives. Notre confrérie vaut bien, je suppose, celles des tailleurs de pierre et des tailleurs d'habits, celles des ajusteurs de charpentes et des cuiseurs de pain, et malgré cela, elle n'a pas de saint qui prenne ses intérêts et la patronne auprès du Seigneur ; ce qui fait dire aux méchantes langues que jamais un des nôtres ne fut trouvé digne d'entrer en paradis. Or, je vous propose d'envoyer quelqu'un en ambassade vers le bon Dieu, pour obtenir de Lui qu'il nous accorde un patron. J'espère qu'il trouvera parmi ses élus, quelqu'avocat, homme de bien, et qui, sa vie durant, se garda de plaider les mauvais procès. Si mon idée vous agréa, nous choisirons l'un des nôtres, bon logicien, bon orateur, pas trop bavard, mais pas homme politique, beau parleur toutefois, et que son honnêteté laisse en bon termes avec Dieu, la Vierge, et toute la cour céleste."

Ayant ainsi parlé, le vieux bâtonnier s'assit. Chaque avocat opina à la manière d'alors et qui était, si je ne m'abuse, de soulever discrètement son bonnet de la main droite.

"Puisque nous sommes tous d'accord, continua l'orateur, il nous faut faire choix d'un ambassadeur digne et capable. Pour moi, ma goutte m'interdit un voyage aussi long, mais je propose à vos suffrages Maître Yves de Kernmartin, habile homme et homme honnête."

L'assemblée, unanimement, ratifia ce choix, et la séance étant levée, les avocats rentrèrent en leurs demeures, non sans avoir embrassé leur confrère, lui souhaitant bonne route et heureux succès.

Dès le lendemain, à l'aube, Yves quitta son manoir. Tout en cheminant, il ruminait un long plaidoyer. Au soir du troisième jour, il arriva à l'entrée du paradis. Il faut vous dire que la Bretagne en est moins loin que les autres pays. Il frappa trois coups, et Saint Pierre apercevant par la porte entrebâillée le volumineux dossier que le pelerin avait sous le bras, ne fut pas sans s'émuouvoir, et crut prudent de lui demander ses noms et qualités.

— Je m'appelle Yves de Kermartin, répartit le voyageur, je suis breton et gentilhomme.

— Breton et gentilhomme, c'est bien, répartit le céleste portier, mais que faites-vous sur terre ?

— Je suis avocat.

— Avocat ? Quel titre est-ce là, vraiment ? Voilà un métier qu'on ne connaît guère dans le divin royaume !

Saint Pierre, tout en parlant, essayait de repousser Yves. Je n'ose dire que ce dernier ne le bouscula pas un peu ; toujours est-il que le Breton pénétra dans le ciel et s'en alla à travers les salles lumineuses, cherchant le trône, environné de séraphins où l'Eternel est assis.

Les élus, voyant son costume étrange qu'ils ne connaissaient pas encore, fuyaient devant le pauvre ambassadeur et couraient, criant à Dieu qu'un saint de contrebande s'était introduit dans le ciel. Yves les suivit et se prosternant par trois fois la face dans la poussière devant le Très-Haut, il dit : Seigneur, avant de les croire, je vous supplie par grâce, d'entendre ma requête. Et sortant son plaidoyer de sa serviette d'audience, il le débita tout au long. Le Grand Juge ne s'en ennuya point, l'écouta avec attention et même en admira l'éloquence.

Il manda Saint Luc l'Evangéliste, qui, comme chacun sait, est gardien des archives du Saint palais, et il lui ordonna de les fouiller sur l'heure, et de rechercher, si dans les registres, il ne trouverait pas le nom de quelqu'avocat.

Saint Luc revint : ses recherches avaient été vaines.

Yves rougissait et commençait à perdre contenance. Alors Dieu lui dit : — Maître Yves, tu le vois, nous ne pouvons te donner pour patron des avocats un Saint qui plaida dans sa vie. Mais pour te prouver que je désire te renvoyer content, va, les yeux

bandés, à travers la galerie où tous mes saints ont leurs statues; celui de mes élus sur qui tu poseras la main, je te l'alloue comme patron de ta confrérie. Bon ou mauvais, tu le prendras."

Sur l'ordre de Dieu, l'honnête Tréconois se noue sur les yeux un épais bandeau et va, les bras en avant, pas à pas, s'évertuant à deviner quelle statue il doit toucher.

Enfin, il s'arrête, hésitant, et promène sa main sur une tête; "front chauve et déprimé, dit-il, lèvre moqueuse, cela doit être un procureur, si même ce n'est pas un président ou un juge. Ma foi, faute de mieux, je le prends pour patron des avocats."

Aussitôt un immense éclat de rire parcourut les rangs des élus, qui tous, étaient venus en curieux assister au choix d'Yves de Kermartin.

Celui-ci pressé de faire connaissance avec son patron, arrache le bandeau de ses yeux, regarde, et pousse un cri d'effroi. C'était bien pis qu'un président, c'était bien pis qu'un juge, c'était bien pis même qu'un procureur, c'était..... messire Satanas!!! Vous vous demandez peut-être comment sa diabolique seigneurie se trouvait là? C'est qu'au ciel, comme sur terre, le Grand St. Michel est représenté dans ses statues, terrassant le diable, et lui rognant les griffes de son glaive d'or.

Le Breton avait pris le diable pour l'ange!!

— "Ah mon pauvre maître, lui dit Dieu, voici que le hasard te joue un bien vilain tour."

Mais comme je ne veux pas d'un tel patron, surtout pour le Barreau de Bretagne, dès à présent je t'enrôle dans la troupe de mes élus, et les avocats n'auront plus à chercher un saint qui les patronne."

Or, ce fut, dit-on, à cet instant même que le gentilhomme breton mourut en la ville de Tréguier, le dix-neuvième jour du mois de mai, treize cent trois, et voilà comment, dans sa foi naïve, la légende raconte que Mgr. Saint Yves, le glorieux ami de Dieu, devint patron des avocats. (LA FRANCE JUDICIAIRE.)—See page 77, ante, for reference to Sanctus Ivus' hymn, *advocatus sed non latro*.

## COPYRIGHT IN SERMONS.

The Rev. Joseph Parker writes complaining of the theft committed by newspaper reporters in reporting sermons, and he winds up his letter by saying that he wants to know "whether a preacher can legally protect his sermons; or, failing this, whether the moral sentiment of the public cannot be roused to resent a piracy which is made the more infamous by working under the plea of pious interest in the spread of religion." With the latter part of his question we need not deal, beyond saying that we quite agree that there ought to be protection for sermons just as much as for any other productions of men's brains. The question we wish to consider is, Can a preacher legally protect his sermons from reproduction in a paper or other publication? The point has been recently remarked on in the case of *Caird v. Sime*, 57 Law J. Rep. P. C. 2; L. R. 12 App. Cas. 326. Mr. Scrutton's 'Law of Copyright,' 2nd edit. p. 65, lays down that at common law the author of any literary composition has the right to prevent its publication until he himself has made it public; and the right will not be destroyed by the fact that the author communicates such a composition to a limited number of persons under express or implied conditions restraining them from publishing it themselves. A preacher, therefore, as a lecturer, will, until he has published his composition, be entitled at common law to prevent publication of it by others. In *Caird v. Sime* it was held that a professor of a university who delivers orally in his class-room lectures which are his own literary composition does not communicate such lectures to the whole world so as to entitle anyone to republish them without the permission of the author. Professor Caird, of the University of Glasgow, delivered lectures in his class-room, as part of his ordinary course, to students of the university, who were admitted on payment of the prescribed fees. And it was held that such delivery of the lectures was not equivalent to a communication of them to the public at large, and that Professor Caird was entitled to restrain other persons from publishing them. But in thus deciding Lord Chancellor Halsbury expressly distinguished the case of sermons: "It is intelligible," he says, "that when a person speaks a speech to which all the world is invited, either expressly or impliedly, to listen, or preaches a sermon in a church, the doors of which are thrown open to all mankind, the mode and manner of

publication negative, as it appears to me, any limitation." Mr. Copinger, in the 'Law of Copyright,' 3rd edit. p. 59, states that under the Act 5 & 6 Wm. IV. c. 65, which specially protects lectures, except those delivered in any university or public school or college, or on any public foundation, or by any individual in virtue of, or according to, any gift, endowment, or foundation, it would appear that sermons preached by clergymen of the Church of England in endowed places of public worship are deemed public property. The Act in question does not in any way alter the law as to sermons in general, which must be dealt with under the common law. In accordance, then, with Lord Halsbury's statement, it seems that a sermon preached in a parish church, or in any clerical building to which the public are admitted freely, is thereby published, and the author can no longer restrain publication of it. But if the church is fenced round with restrictions and the public are not admitted freely, but only on condition that they undertake not to republish what they hear, and if express notice is given to this effect to every person entering, it seems to us possible that in this case a right of protection might still be retained. The point is, of course, a difficult one. In the old case of *Abernethy v. Hutchinson*, 3 Law J. Rep. (o. s.) Chanc. 209, 217, Lord Chancellor Eldon says: "I should be very sorry if I thought that anything which had fallen from me would be considered to go to the length of this—that persons who attend lectures or sermons and take notes are to be at liberty to carry into print those notes for their own or others' profit. I have very little difficulty on that point. But that doctrine must apply either to contract or breach of trust." Mr. Parker's only remedy, therefore, till the law is altered seems to be to make a contract with his audience that they will not republish his sermons. We should be very glad to see a decision of the law on the important point he raises, and invite him, as a public-spirited man, to assist, by bringing an action, towards an elucidation of it.—*Law Journal (London.)*

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### THE TRUE PROFESSIONAL IDEAL.

[Concluded from p. 368]

Mr. Field had lofty professional ideals of the lawyer's duty towards the law. Love of the pecuniary gains of his calling, though he was not insensible to them, was yet ever subordinate

in his regard to those public labors which he felt that he owed to his profession and the law. Although in active practice in a great metropolitan centre for over sixty years, he accumulated no more than some contemporary men at the English bar, and perhaps some in the same city, have done in less than a tenth of the same period. But it may be said that he was ambitious, that his ambition was boundless, and that this was his incentive. Be it so. So, doubtless, it was. Exercised for worthy ends, this, so far from being the last infirmity, is the highest quality of noble minds. Nor had official place, either for the conspicuousness which attracted and was flattered by the public gaze, or for the power which men of lower aims who live only in the present, love to wield, any controlling charms for him. His eye was lifted higher and was fixed chiefly on the generations who should come after him. Of the present, he regarded himself, if I may phrase it, as a tenant for life, but with a reversion in fee in the limitless future. Cheerful in the prolonged autumn of his days, he had for nearly a generation before his death, seen the "leaves fall over the roots of the tree of life," but this as he looked above and beyond only gave to his vision a freer and more unobstructed view. With great felicity of expression, Sir Walter Scott makes Kemble, on finally leaving the Edinburgh stage, say he hoped to enjoy

Some space between the theatre and the grave ;  
That like the Roman in the Capitol,  
I may adjust my mantle ere I fall.

Such, too, was Mr. Field's hope, doomed however to disappointment. On his return from Europe, only three or four days before he passed beyond the range of our mortal vision, he is reported to have said, in answer to the question what he intended to do, that he expected to spend the coming summer in the Berkshires at work on his autobiography, and that his one great ambition was to have his codes adopted all over the English-speaking world. All old men live largely in the past, and to this Mr. Field, who had crossed the Delectable Mountains and was already in the country of Beulah, was no exception. It was natural that he should love to survey, in the serene evenings of his days, the toils and labors which had marked his active life and the successes with which these had been rewarded. But only men of the higher type can turn, as turn he did, to the future, see it

spread itself out before their enraptured gaze, feel themselves fanned by its intoxicating breezes, behold its sunlit heights glorified and beautiful, and proudly feel that it, too, is their inheritance.

With this let us contrast the life and professional career of an eminent English contemporary of Mr. Field's earlier life,—I refer to Sir William Follett, who in his day was as distinctly the leader of the bar as was Lord Erskine in his. The picture has been drawn by Sir William's own friend, the accomplished Talfourd, who in his "Vacation Rambles," tells us that there was brought to him in 1846, when on his journey through Italy, the usual register of visitors, and that, turning over its pages, he was startled by the name of Sir William Follett written in tremulous characters just before his death, which had occurred but a short time before Talfourd saw his signature. After reviewing Follett's professional career, usually pronounced so brilliant, Talfourd mournfully inquired, "What remains?" and he answered, "A name dear to the affections of a few friends; a waning image of a modest and earnest speaker, though decidedly the head of the common law bar; and the splendid example of success embodied in a fortune of £200,000 acquired in ten years, the labors of which hastened the extinction of his life; these," he added, "these are all the world possesses of Sir William Follett. To mankind, to his country, to his profession, he left nothing; not a measure conceived, not a danger averted, not a principle vindicated, not a speech intrinsically worth preservation, not a striking image, nor an affecting sentiment; in his death the power of mortality is supreme. How strange—how sadly strange—that a course so splendid should end in darkness so obscure."

Follett did not discharge the debt he owed to the profession, and, therefore, did not answer to the completest professional ideal of the lawyer. Mr. Field not only paid the debt due to his profession, but overpaid it and thus became its creditor, and in this answered more fully than lawyers like Follett the highest professional ideal.

In the report on legal education before mentioned, it appears that there are over fifty law schools in the United States, having a membership of more than six thousand students—the committee not having the means of ascertaining the number of students who were pursuing their studies in private offices outside of the law

schools. I fully concur in the following observations of the committee. Their soundness will not be questioned, I think, by any one who hears me:—

“The mind of the lawyer is the essential part of the machinery of justice; no progress or reform can be made until the lawyers are ready. Their influence at the bar, on the bench, and in legislation is practically omnipotent.”

The following observation seems to me to be specially weighty and important:—

“The progress of the law means the progress of the lawyer, not of a few talented men who are on the outposts of legal thought, but the great army of the commonplace who contribute the majority of every occupation. What the lawyers do not understand or what they pronounce visionary or impracticable will not be accepted by the legislatures or courts of the country.”

It is no part of my purpose to offer any views upon the methods of law instruction, much less upon the different or competing methods. Doubtless the method of teaching law or how it can best be taught is an important subject, but it is not all-important. It is wise to discuss and consider it, but it would not be wise to let it engross our whole or even chief attention. What Pope said of forms of government may, I think, be said with much more justness of methods of teaching—“that which is best administered is best.” The man whom nature designed to be a teacher of law will, despite all theories, teach it after his own manner. He will impress his own personality upon his work. It is the man, not the method, that tells. The crucial test is whether the teacher can inspire a living interest in the student and get from him the best work that in him lies; for, after all, the student must himself do the work and the thinking which shall accomplish him in the learning and mystery of his profession. Vastly more important, therefore, than the methods of teaching is the course of instruction or the branches to be taught. This general subject is very fully and, I need not say, ably discussed in the report of the committee on Legal Education, of this association, submitted in 1892. After reviewing the course of instruction in the law schools of this country (and it is substantially the same in all of them), the committee says:—

“It is evident that the course of study, with a very few exceptions, is confined to the branches of practical private law which

a student finds of use in the first five years of his practice. It is a technical or philosophic view of the law which is taught. It may be said of all our law schools that the instruction is too technical. It is not elementary enough. The view of the law presented to the student is technical, rather than scientific or philosophical."

What is meant by the course of instruction being confined to private law which the student will find of use in earlier years of his practice, may be illustrated by the course of instruction in what is justly regarded as one of the very foremost law schools of this country, that of Harvard University. I select it for illustration because of the deserved eminence of the school, and because it covers all of the studies embraced in a three years term.

The following synopsis I assume to be correct, being taken from the above mentioned report of the committee on Legal Education:—

"Law School of Harvard University, Cambridge, Mass., nine instructors, 363 students, 44 graduates, 36 weeks in school year.

"Course of study: First year.—Contracts, 108 hours; Criminal Law and Procedure, 72 hours; Property, 72 hours; Torts, 72 hours; Civil Procedure, at Common Law, 36 hours. Books used.—Langdell's Cases on Contracts; Chapin's Cases on Criminal Law; Gray's Cases on Property, Vols. 1 and 2; Ames's Cases on Torts; Ames's Cases on Pleading.

Second year.—Agency, 72 hours; Bills of Exchange and Promissory Notes, 72 hours; Law of Carriers, 72 hours; Contracts, 72 hours; Evidence, 72 hours; Jurisdiction and Procedure in Equity, 72 hours; Property, 72 hours; Sales of Personal Property, 72 hours; Trusts, 72 hours. Books used.—Ames's Cases on Bills and Notes; Keener's Cases on Quasi-Contracts; Langdell's Cases in Equity Pleading; Gray's Cases in Property, Vols. 3 and 4; Langdell's Cases on Sales; Ames's Cases on Trusts.

"Third year.—Constitutional Law, 72 hours; Corporations, 72 hours; Jurisdiction and Procedure in Equity, 72 hours; Partnership, 72 hours; Property, 72 hours; Surety and Mortgage, 72 hours. Books used: Ames's Cases on Partnership; Gray's Cases on Property, Vols. 5 and 6.

"Extra courses.—Patent Law, 10 lectures; Peculiarities of Massachusetts Law and Practice, 2 hours a week.

"Admission and Methods of Instruction.—Applicants for admission not graduates of a college are examined in Latin (Cæsar, Cicero), Blackstone's Commentaries. Every student who has been in the school one year or more has an opportunity each year of arguing in a case before one of the professors in a moot court."

The subjects taught and the books used show more clearly than any general description the intensely technical and practical character of the course of instruction. This may stand, I think, as the general model or even highest type of legal instruction in this country.

I agree in the main with the spirit of the committee's criticism which I have above quoted, but I would phrase my own views in somewhat different language. I insist, for I believe it to be true, that the stereotyped course of legal instruction in this country is defective, not so much for what it contains as for what it omits. It is defective in that no adequate provision is made for specific instruction in historical and comparative jurisprudence, and in the literature, science and philosophy of the law—in what may, perhaps, be compendiously expressed as general jurisprudence. If this is what the committee means by the expression that the course of instruction is too technical, I agree with it. But it is to be remembered that it is of the essence of our legal systems that they are in their historical development and nature, technical, and so far as they are so, instruction, to be adequate and thorough, must itself be technical, and in an important sense it is not predicable of it that it is too technical. Having in view the circumstances which surround the subject of legal education in this country, I approve the wisdom of the general course of instruction in our law schools, so far as it gives chief attention to the usual and enumerated branches of practical private law. But I still insist that it is defective in the want of adequate provision for instruction in the history and the literature of the law and in what I call, for short, "general jurisprudence."

Great lawyers, like Coke and Blackstone and Eldon, may be made by the current methods; but the growth of greater lawyers like Hale, Bacon and Mansfield, who in their day wisely amended and improved the law, and who represent the higher professional ideals, is not adequately promoted or encouraged by the existing course of methods of law instruction in the law schools of this country.

I fully realize that to set up an impracticable standard defeats the object sought. Nevertheless, I insist that it is entirely practicable for our law schools to enlarge and liberalize the scope of their instruction by requiring at least one hundred hours of the course to be given specifically to the subjects which I have above ventured to indicate as essential to any well-ordered course of instruction that makes any just claim to being adequate or complete.

And this view it is the sole practical point of this paper to urge and enforce, to the end that the generations of lawyers who shall come after us may be adorned more abundantly than else had been with examples of the highest and truest professional ideals.

And to this end, moreover, I should be glad to see the members of the section on legal education take the initiative by recommending the American Bar Association to adopt a resolution, in substance, that in its judgment adequate instruction in historical, comparative and general jurisprudence is an essential part of a thorough course of legal education, and, accordingly, that it recommends to all of the law schools of the country that such instruction should be made a distinct and specific branch of the course of required study therein.

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### GENERAL NOTES.

**QUEEN'S COUNSEL.**—In 1775, the year in which the 'Law List' was published for the first time, the number of King's Counsel did not exceed fourteen; the list of Queen's Counsel in the current volume of that interesting publication consists of 212 names. The first Q. C.—to use the more familiar letters as to one who was really a K. C.—was Sir Francis Bacon, who obtained from James I., after much solicitation, the patent which provided his memory with a special claim to the esteem of the leaders of the Bar. The duties which the great philosopher performed by virtue of his appointment are not apparent, but it is clear that he enjoyed an annuity of 40*l.* for the remainder of his life. The position of Q. C.'s was of considerable value while serjeants-at-law were practising, because they enjoyed audience in the Courts, on the assumption that the business in which they were engaged was that of the Crown—an assumption which is responsible for the well-known priority of Q. C.'s in moving in the Chancery

Courts. Another thing which distinguished a Queen's Counsel from a Serjeant was the black patch on the wig of the latter. Upon this difference hangs one of the best anecdotes in Serjeant Robinson's volume of reminiscences. Sir Henry Keating, Q. C., and Serjeant Allen, while walking to their lodgings from the Assize Court at Stafford, were followed by two working men who had witnessed their forensic combat before the rising of the Court. 'If you were in trouble, Bill,' said one man to the other, 'which of these two tip-top 'uns would you have to defend you?' 'Well, Tim,' was the reply, 'I should pitch upon this one,' pointing to the Q. C. 'Then you'd be a fool,' said his companion; 'the fellow with the sore head is worth six of t'other one.'—*London Globe*.

IRISH WITNESSES.—Mr. Le Fanu, in his book of recollections, tells some amusing tales of the conduct of Irish peasants in the witness-box. A bullying counsel named Freeman was completely put out in his cross-examination by a very simple answer. A countryman who was a witness was asked, 'So you had a pistol?' 'I had, sir.' 'Whom did you intend to shoot with it?' 'I wasn't intending to shoot no one.' 'Then was it for nothing that you got it?' 'No—it wasn't.' 'Come, come, sir—on the virtue of your solemn oath, what did you get that pistol for?' 'On the virtue of my solemn oath, I got it for three and nine-pence in Mr. Richardson's shop.' At another time the same counsel said to a witness, 'You're a nice fellow, ain't you?' Witness replied, 'I am, sir; and, if I was not on my oath, I'd say the same of you.'—*Law Journal*.

ELECTRIC WIRES.—The liability of electric light companies for dangerous wires has been decided in two Massachusetts cases. In one of them,—*Illingsworth v. Boston Electric Light Co.*, 25 L. R. A. 552,—the company was held responsible for injury to the employee of another company which had a joint use of the frame for the wires, if they were negligently left in bad condition. In the other case of *Hector v. Boston Electric Light Company*, 25 L. R. A. 554, the company was held not liable to the employee of another company for the unsafe condition of its wires over the roof of a building, because of the allowance of a joint use by the other company of a standard for its wires on a different building, adjoining.

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